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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~714~~ 35

THOMAS E. POLLARD, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 8, 1955

CERTIORARI GRANTED FEBRUARY 27, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 714

THOMAS E. POLLARD, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. 1]

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MINNESOTA
FOURTH DIVISION

Commissioner's Docket No. 1

Case No. 94

UNITED STATES OF AMERICA

v.

THOMAS E. POLLARD

WARRANT OF ARREST AND RETURN—July 17, 1951

To Any U. S. Marshal or Authorized Officer:

You are hereby commanded to arrest Thomas E. Pollard, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with willingly, knowingly and feloniously taking, on or about May 21, 1951, at Minneapolis, Minnesota, after delivery into an authorized mail receptacle and before receipt by the addressee, a certain letter mailed on or about May 18, 1951, at Minneapolis, Minnesota, by Lea Testin, U. S. Reg. Dis. Off., addressed to John & Alice G. Flury, Rt. 4, Bemidji, Minn., forwarded by the P. O. Dept. to 1626 Linden Ave., Minneapolis, Minn., and removing the check contained therein, in violation of U.S.C. Title, 18, Section 1702, U. S. Code.

Date July 17, 1951.

——— ———, United States Commissioner.

RETURN

Received July 17, 1952, 19 — at St. Paul, Minn., and did not executed by arrest of Defendant sentenced in Fed. Court Minneapolis, Minnesota on Oct. 3, 1952 —— at —— on ——, 19 ——.

Date Nov. 20, 1952.

John J. McGowan, United States Marshal; District of Minnesota. By Charles E. Morrison, Deputy.

[fol. 2] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[Title omitted]

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18 SECTION 1702—July 17, 1951

Before C. O. Lundquist, 715 Midland Bank Building, Minneapolis, Minnesota.

The undersigned complainant being duly sworn states:

That on or about May 21, 1951, at Minneapolis, Minnesota, in the County of Hennepin District of Minnesota, Thomas E. Pollard did willfully, knowingly and feloniously take, after delivery into an authorized mail receptacle and before receipt by the addressee, a certain letter mailed on or about May 18, 1951, at Minneapolis, Minnesota, by Lea Testin, U. S. Regional Disbursing Officer, addressed to John & Alice G. Flury, Rt. 4, Bemidji, Minnesota, and forwarded by the Post Office Department to 1626 Linden Avenue, Minneapolis, Minnesota, and that the defendant did willfully, knowingly and feloniously open said letter and remove the U. S. Treasury check, No. 18,186,703, dated May 18, 1951, in the amount of $192.29, contained therein.

C. E. Knudson, Post Office Inspector.

Sworn to before me, and subscribed in my presence, July 17th, 1951.

C. O. Lundquist, United States Commissioner.

Filed December 6th, 1952. Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy.

[fol. 3] DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

WAIVER OF INDICTMENT—September 8, 1952

Thomas E. Pollard the above named defendant, who is accused of unlawfully taking out of a letter addressed to John and Alice G. Flury, Route 4, Bemidji, Minnesota, before it had ~~been~~ delivered to the persons to whom it was directed, a United States Treasury Check, No. 18,186,70, dated May 18, 1951, in the amount of $192.29, and embezzling the same, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

Thomas E. Pollard, Gladys A. M. Rippe, Counsel for Defendant.

Date September 8th, 1952.

[File endorsement omitted]

[fol. 4] UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

INFORMATION—Filed September 8, 1952

The United States Attorney Charges:

On or about the 21st day of May, 1951, in the City of Minneapolis, County of Hennepin, State and District of Minnesota, one Thomas E. Pollard did unlawfully take out of a letter addressed to John and Alice G. Flury, Route 4, Bemidji, Minnesota, before it had been delivered to the persons to whom it was directed, a United States Treasury

Check, No. 18,186,703, dated May 18, 1951, in the amount of $192.29, and did embezzle the same.

Philip Neville, United States Attorney.

[fol. 5] 9/8/52. (Joyce, J.) Hachey, PLEA "G," ref. & def. No counsel.

10/3/52. Joyce, J. (Hachey), 3 YEARS PROB., to Commence immediately after release from Stillwater. No counsel.

9/21/54. Joyce, Jr. (Evarts (Anderson), 2 YEARS, Jdgt. & Order of Prob., Etd. on 10/3/52 set aside). No counsel.

[fol. 6] UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

TRANSCRIPT OF PROCEEDINGS OF OCTOBER 3, 1952

The above entitled matter came on for sentencing before the Honorable Matthew M. Joyce, judge of the above court, in the United States Court House, Minneapolis, Minnesota, October 3, 1952; Ronald E. Hachey, Esq., Assistant United States District Attorney; the defendant appearing without counsel.

Mr. Hachey: Next matter is United States versus Thomas E. Pollard. This matter is here for sentencing, your honor. At this time the Government moves for sentencing of the defendant.

The Court: You are presently in Stillwater?

The Defendant: Yes, sir.

The Court: How long have you been there?

The Defendant: Thirteen months, sir.

The Court: Have you any craving or desire for a drink now?

[fol. 7] The Defendant: None whatsoever.

The Court: You are about 35?

The Defendant: Yes, sir.

The Court: I suppose that you are an age where you realize now the futility, don't you?

The Defendant: Yes, very much so, your Honor.

The Court: The report shows that you have taken a very active interest in the AA organization in the prison.

The Defendant: I have, sir.

The Court: And that you contemplate doing that when you get out?

The Defendant: I do.

The Court: The report also shows that you won't get out until 1953 sometime.

The Defendant: December, 1953 is my discharge date.

The Court: When do you have an opportunity for going before the parole?

The Defendant: Next month—I was given *given* three months in August, a three month waiting term, period, in August.

The Court: There was one thing you did, as shown in this probation report, which appealed to me. I realize that you had been on a protracted spree when you stole this government check, but when you sobered up long enough to understand what you had done, you went to one of the officers of the Alcoholics Anonymous and told him what [fol. 8] you had done and you sought to make amends insofar as you then could do. You told the FBI the circumstances, without any effort on your part to minimize the offense; in fact you had been drinking for some two weeks continually.

You are now 35 years of age.

The Defendant: Yes, sir.

The Court: You ought to know the misery and the grief and the sorrow and the horror of what continued drinking on your part will bring to you.

If I might suggest to you, and I am giving you gratuitous advice but it is the result of observation and experience—it is my view that when you get out you should immediately join the Alcoholics Anonymous organization—not wait a week or two weeks or three weeks—but have that your first mission after you contact your family, and do what they tell you to do and do it immediately and do it diligently and faithfully, carry out every obligation that they impose upon you. With your background and with your ability I think that you can win this fight.

If you don't do those things, and if you want to revert to drinking, you will be back here again because you will

commit some federal offense, and I won't be talking to you this way if you are ever before me again.

So, good luck to you and I hope the parole board will give you an opportunity.

[fol. 9] That is all.

The Defendant: Thank you very much, sir.

(Other criminal matters were then presented to the Court.)

The Court: Is there anything else, Mr. Hachey?

Mr. Hachey: Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary period after his release from Stillwater, or any type of sentencing?

The Court: It is to commence at the expiration of sentencing at Stillwater.

Mr. Hachey: Probation to commence after expiration of his sentencing at Stillwater—for how long?

The Court: Three years.

[fol. 10] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

JUDGMENT AND ORDER OF PROBATION—October 3, 1952

On this 3rd day of October, 1952, came the attorney for the government and the defendant appeared in person, and [1] without counsel; the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

It is adjudged that the defendant has been convicted upon his plea of [2] guilty of the offense of embezzlement of United States check in violation of 18 USC. 1702 as charged [3] in and Information (Ind. Waived) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court, It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that [4] imposition of sentence be, and the same is hereby suspended, and defendant is placed on probation to the United States Probation Officer for a period of three (3) years; said probation to commence immediately after his release from Stillwater Penitentiary, Stillwater, Minnesota.

[File endorsement omitted.]

It is further ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation

---

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number —" if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the foliowing: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of — years from this date."

as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It is further ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Approved:

Matthew M. Joyce, United States District Judge.
Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy Clerk. (Ronald E. Hachey, Ass't. U.S. Atty.)

[fol. 11] UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

Criminal Case No. 8283

[Title omitted]

ORDER FOR WARRANT—September 1, 1954

Upon the report of the U. S. Probation Officer that the above-named defendant has violated the terms of his probation and that there is probable cause that his probation should be revoked, the Clerk of Court is hereby instructed to issue a warrant so that the defendant may be arrested and brought before this Court.

By the Court: Matthew L. Joyce, United States District Judge.

Dated: Sept. 11th, 1954.

[File endorsement omitted.]

[fol. 12] UNITED STATES DISTRICT COURT, FOURTH DIVISION, DISTRICT OF MINNESOTA

BENCH WARRANT AND RETURN—September 1, 1954

The President of the United States of America

To any United States Marshal or any other authorized Officer:—Greeting:

You are hereby commanded that you apprehend Thomas E. Pollard and him immediately have before the United States District Court for the District of Minnesota at Minneapolis, Minn., to show cause why the probation accorded him on October 3rd, 1952 should not be revoked. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Matthew M. Joyce, United States District Judge at Minneapolis, Minnesota this 1st day of September, A. D. 1954.

Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy Clerk.

[fol. 13] UNITED STATES MARSHAL'S RETURN

District of Minnesota, ss:

Received the within writ the 1st day of September, 1954, and executed same with the arrest of Thomas E. Pollard on Sept. 15, 1954 at 2:30 PM.

C. Enard Erickson, United States Marshal, By Robert L. Allie, Deputy Marshal.

Filed Sept. 15, 1954.

Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy.

[fol. 14] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

CLERK'S TEMPORARY COMMITMENT AND RETURN

Temporary commitment of Thomas E. Pollard to the United States Marshal for the District of Minnesota:

By order of court entered on September 1st, 1954, at Minneapolis, Minnesota you are commanded to take the custody of the above-named defendant and to commit him, with a certified copy of this commitment, to the Custodian of a place of confinement within this district approved by the Attorney General of the United States where the defendant shall be received and safely kept until discharged in due course of law.

Chell M. Smith, Clerk. By Gladys A. M. Rippe, Deputy Clerk.

Dated September 15th, 1954.

RETURN

Received this commitment and designated prisoner on Sept. 15, 1954, and on Sept. 15, 1954, committed him to Hennepin County Jail and left with the custodian at the same time a certified copy of this commitment.

C. Enard Erickson, United States Marshal. (By) Robert L. Allie, Deputy.

Dated: Sept. 15, 1954.

Filed Dec. 6, 1954, Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy.

[fol. 15] UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

TRANSCRIPT OF PROCEEDINGS—September 21, 1954

The above entitled matter came on for hearing before the Honorable Matthew M. Joyce, a Judge of the above-entitled court on September 21, 1954.

APPEARANCES:

Harold Evarts, Assistant U. S. Attorney, appearing on behalf of the Government.

Mr. Evarts: If it please the Court, the first matter is United States vs. Thomas E. Pollard. The defendant, Your Honor, is before the Court at this time and is not represented by counsel, is that correct?

The Defendant: That's correct.

[fol. 16] Mr. Evarts: You understand you have the right to be represented by counsel?

The Defendant: Yes, sir, I do.

Mr. Evarts: Is it your desire to waive that right?

The Defendant: Yes, sir. It is.

The Court: What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.

Mr. Evarts: Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an Order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.

The Court: All right.

I hereby certify that the above and foregoing transcript is a true and correct copy of my original stenographic notes taken at the above time and place.

Earl G. Anderson, Official Court Reporter.

[fols. 17-18] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA—FOURTH DIVISION

[Title omitted]

JUDGMENT AND COMMITMENT—September 21, 1954

On this 21st day of September, 1954 came the attorney for the government and the defendant appeared in person and without counsel; the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel.

It is adjudged that the defendant has been convicted upon his plea of guilty of the offense of embezzlement of United States check in violation of 18 USC. 1702, as charged in an Information (Ind. Waived) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years

It is adjudged that the Judgment and Order of Probation made and entered on October 3rd, 1952, is hereby set aside.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved:

Matthew M. Joyce, United States District Judge.
Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy Clerk.

Harold C. Evarts, Ass't. U. S. Atty.

Filed September 21, 1954.

Chell M. Smith, Clerk, By Gladys A. M. Rippe, Deputy.

[fol. 19] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, MINNEAPOLIS DIVISION

Minneapolis, Minnesota

[Title omitted]

PETITION FOR MOTION TO VACATE SENTENCE JUDGMENT: SECTION 2255, TITLE 28, U.S.C.A.—Filed February 11, 1955

Comes now, Petitioner, who states he is a layman, unlearned at law, and does not have funds to pay for this action. Petitioner begs the Court's indulgence in the matter of form.

FACTS

(1) Petitioner states that, on or about September 15, 1952, while incarcerated in the Minnesota State Prison, Stillwater, Minn., he was brought before Judge Matthew M. Joyce in the U. S. District Court in Minneapolis, Minn., and arraigned on a charged of "embezzlement." Petitioner also states that he entered a plea of "guilty" at that time and was remanded to a future date for sentencing.

(2) Petitioner states that on October 3, 1952, he was again brought before Judge Joyce. Petitioner states that, as the transcript and record of this proceeding will indicate, at no time or in any instance in the petitioner's presence did Judge Joyce cite, refer or allude to or specify a sentence of any nature or description. Petitioner further states that he, as well as his wife, a close and interested personal friend and two officials of the Minn. State Prison who were all present in the court-room, was under the impression that petitioner's case was dismissed in that no sentence was handed down and petitioner was not remanded for a further hearing.

[fol. 20] (3) Petitioner states that he was paroled from the Minn. State Prison on the day before Thanksgiving, 1952 and at this time was informed by prison officials that he was to report to the Federal Probation Office in Minneapolis, Minn. When petitioner inquired of the prison officials as to why it was necessary for him to report to said office he was informed that they did not know but that they would investigate. After the prison officials had conversed by telephone with the federal probation office in Minneapolis, pe-

titioner was notified that, although petitioner *was not present at time of sentencing;* and *entirely* (until this time) *unknown to him,* he had been "sentenced" to three (3) years probation and said "embezzlement" charge.

(4) Petitioner further states that, upon his initial report to federal probation officer Mr. Reynold Lee, petitioner inquired as to how he could possibly be on Federal probation when *he had never been sentenced in any way, at anytime to any sentence.* At this time, although Mr. Lee had no evidence to dispute petitioner's allegation, he yet undertook to and succeeded in convincing petitioner that the "sentence" of three (3) years probation was legal. Petitioner, being unversed in law and desiring to be cooperative in every respect, felt at that time that he was forced to accept Mr. Lee's explanation.

(5) Petitioner Further states that, approximately one (1) year later, he again brought up the question of his never having stood before a Federal Judge and received said three (3) year probationary "sentence". At this time Mr. Lee advised petitioner that he would investigate the matter and that he would have some definite word on it at petitioner's next report date in two (2) weeks. Upon petitioner's next report, Mr. Lee informed him that to his (Mr. Lee's) "surprise", he had found, upon investigation, that petitioner's allegations regarding this matter were "entirely true", and further stated that, in all his years of federal service, he had "never witnessed a situation like this before". Further conversation with Mr. Lee at this time led petitioner to believe that it would not be wise to pursue said matter further—petitioner had no knowledge as to what further complications he might or could become involved in. [fol. 21] (6) On September 21, 1954, because of petitioner's excessive drinking, his "probation" was violated and he was again brought before Judge Joyce. At this time, September 21, 1954, Judge Joyce stated in open court that petitioner's original three (3) year probationary "sentence" was therein "set aside", and sentenced petitioner to two (2) years incarceration in a Federal penal institution.

CONTENTIONS

1. Petitioner was at no time sentenced to said three (3) years probationary sentence.

2. Since petitioner was never sentenced to said three (3) years probation, petitioner's present sentence of two (2) years incarceration for "probation" violation is illegal and unconstitutional.

3. Petitioner should be immediately released from his present state of incarceration.

4. It is illegal and unconstitutional to sentence an American citizen "in absentia" and without said citizen being offered an opportunity to speak in his own behalf prior to sentencing.

PLEA

Petitioner prays that, although this may not be the correct form, it be taken into consideration that he is a layman and unlearned at law, and that this be filed as a Motion to Vacate Sentence and Judgment under Section 2255, Title 28, U.S.C.A., in Forma Pauperis, and that relief be herein ordered.

Thomas E. Pollard, Petitioner.

COUNTY OF LEAVENWORTH,
State of Kansas, ss:

Subscribed and sworn to before me this 9th day of February, 1955.

(Seal)

Edward O. Doughty, Notary Public.

My commission expires May 21, 1957.

[fol. 22] COUNTY OF LEAVENWORTH,
State of Kansas, ss

AFFIDAVIT IN FORMA PAUPERIS

Thomas E. Pollard, layman and unlearned at law, being duly sworn according to law, deposes and says: That he is petitioner in entitled action; that he is a citizen of the

United States by virtue of birth; that he is a poor and indigent person at this time and because of his poverty he is unable to pay the cost of said action or to give security thereof; petitioner believes he is entitled to the redress he seeks in such action, and said action is taken in good faith.

For such petitioner will ever pray.

Thomas E. Pollard, Petitioner.

Subscribed and sworn to before me this day of February 9, 1955.

(Seal)

Edward O. Doughty, Notary Public.

My commission expires May 21, 1957.

[File endorsement omitted.]

[fol. 23] UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

ORDER DENYING MOTIONS TO VACATE JUDGMENT AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS—March 23, 1955

This matter comes before the court upon the motion of defendant Thomas E. Pollard to vacate the judgment and sentence previously entered herein on September 21, 1954, said motion being made under Title 28 U.S.C. Section 2255, and upon motion to proceed in such matter in forma pauperis.

The court having examined and considered the motion and affidavit addressed in support thereof, and upon all the files and records herein, including the notes of the official Reporter made at the time the said sentence was imposed, finds that:

Defendant was initially sentenced upon September 21, 1954, and the files and records in the case conclusively show that said judgment was within the jurisdiction of

the court and the sentence imposed was valid and in accordance with law.

Accordingly, it is ordered that the motions of defendant and all of them be and the same are hereby denied.

Matthew M. Joyce, United States District Judge.

Dated March 23, 1955.

[File endorsement omitted.]

[fol. 24] IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

NOTICE OF APPEAL AND MOTION AND AFFIDAVIT IN FORMA PAUPERIS—Filed April 4, 1955

Please take notice that the above named petitioner hereby Appeals to the Eighth Circuit Court of Appeals from the order of this Court Denying the relief prayed for herein.

I, the above named petitioner, having been substantially deprived of Due Process of Law, hereby Appeals to the Eighth Circuit Court of Appeals from the above stated judgement and from every part of said order as well as the whole thereof.

Respectfully submitted,

Thomas E. Pollard, Petitioner.

Dated: —— ——.

To: U. S. District Attorney, Minneapolis, Minn.

Appeal: —— ——, District Judge:

[fol. 25] IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

AFFIDAVIT AND MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

Comes now the above petitioner and shows to the Court that he is a citizen of the United States; that he desires to Appeal to the Eighth Circuit Court of Appeals from

the order of this Court Denying the Relief prayed for herein; that he believes he has a meritorious cause of Action and is entitled to the redress he seeks by such Appeal; that his appeal is taken in good faith; that he is without funds and has no property with which to pay or secure the payment of costs of filing Notice of Appeal and preparation of record on Appeal.

Wherefore, Petitioner moves the Court for an order permitting him to file such Notice of Appeal and to proceed on Appeal without the prepayment of fees or costs.

Thomas E. Pollard, Petitioner.

County of Leavenworth,
State of Kansas, ss

Subscribed and sworn to before me this 31st day of March, 1955.

(Seal)

Edward O. Doughty, Notary Public.

My commission expires May 12, 1957.

[File endorsement omitted.]

[fol. 26] United States District Court, District of Minnesota, Fourth Division

[Title omitted]

Order Denying Motion for Leave to Proceed in Forma Pauperis—April 18, 1955

The motion of the above entitled defendant filed with the Clerk of this Court on the 4th day of April, 1955, be and the same is hereby in all respects denied.

Dated April 18, 1955.

Matthew M. Joyce, United States District Judge.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To: The Honorable Archibald K. Gardner, Chief Judge, Eighth Circuit Court of Appeals, Eighth Judicial District, St. Louis, 1, Missouri:

MOTION FOR APPEAL IN FORMA PAUPERIS—Sworn to May 16, 1955

It is my fervent and heartfelt hope that this motion will be accepted as an Appeal in Forma Pauperis and that it's honest and forthright content will, as the writer sincerely feels it does, merit the consideration, action and judgment of the court. Please know that I am a layman, that I am unlearned at law and that I do not have the funds to pay for this action. I respectfully request the Court's indulgence in the matter of form.

On February 9, 1955, I submitted to the United States District Court, District of Minnesota, Fourth Division, a Petition for Motion to Vacate Sentence and Judgment, Section 2255, Title 28, U.S.C.A., in Forma Pauperis, in Case #8283. On March 23, 1955, an order denying this Motion was handed down by the Honorable Matthew M. Joyce.

On March 31, 1955, I submitted to the same court an affidavit and motion for leave to proceed on appeal in forma pauperis. On April 18, 1955 an order denying this was handed down by the Honorable Matthew M. Joyce.

In stating the following facts regarding my case I will try to be as brief and concise as possible. Please let me again request that it be taken into consideration that I am a layman and unlearned at law.

On October 3, 1952, while incarcerated in the Minnesota State Prison, Stillwater, Minn., I was brought before the Honorable Matthew M. Joyce in the United States District Court, Minneapolis, Minn., on a charge of "Embezzlement." to which I pled "guilty." As the transcript and record of the proceedings will indicate, at no time or in any instance in my presence did Judge Joyce cite, refer, allude to or specify a sentence of any nature or description. I, as well as my wife, a close and interested friend and two officials of the Minn. State Prison who were all

present in the courtroom, was under the impression that my case was dismissed in that no sentence was handed down and I was not remanded for a further hearing before being dismissed from the courtroom by Judge Joyce.

I was paroled from the Minn. State Prison on the day before Thanksgiving, 1952, and was informed at the time that I was to report to the Federal Probation Office in Minneapolis, Minn. When I inquired of the prison officials as to why it was necessary for me to report to that office I was informed that they did not know but that they would investigate for me.

[fol. 28] After the prison officials had conversed by telephone with the Federal Probation office in Minneapolis, I was informed that, although I was not present at time of sentencing and entirely unknown to me, I had somehow received a three (3) year probationary sentence as a result of my court appearance on October 3, 1952. Also, at this same time, Deputy Warden Ico Fiske, told me that they definitely knew nothing of any such sentence—that the two prison officials that had escorted me to the court hearing and was present at my hearing on October 3 had reported back to the prison that my case had been dismissed. He also said that he doubted if the Minn. State Board of Parole was aware of any such sentence at the time of my parole Board hearing in November, 1952, because it was not brought up or discussed at the hearing.

On my initial report to federal probation officer Mr. Reynold Lee, Federal Probation Officer, Minneapolis, Minn. I inquired as to how I could possibly be on Federal Probation when I had never been sentenced in any way that I was aware of, at any time, to any sentence. At this time, although Mr. Lee had no evidence to dispute my allegation, he yet undertook to an- succeeded in convincing me that the three (3) year probationary sentence was legal. In that I wished to cooperate with the Federal Officials in every respect, and because I am unversed in law and did not wish to take the time out from providing for my wife and children and re-establishing myself to pursue the matter further, I felt that I was forced to accept Mr. Lee's explanation, unenlightening though it was.

I will be frank and admit that as time went on this situation became as it yet remains—a veritable mental hazard

to me. I simply could not understand how I could be forced to serve a sentence to which I was never sentenced.

Approximately one (1) year later I again brought up the question to Mr. Lee that I had never stood before a Federal Judge and received that three (3) year probationary sentence. At this time, on my repeated plea to him, Mr. Lee said that he would investigate the matter and that he would have some definite word on it at my next report date in two (2) weeks. At my next report Mr. Lee informed me that, to his surprise, he had found that my allegations regarding this matter were entirely true and further stated that in his years of federal service he had never witnessed a situation quite like that before. Mr. Lee told me outright that Judge Joyce had forgotten to sentence me in the courtroom. He went on to show me a transcript of my hearing and pointed out that, added to the bottom of the transcript, the information was added that the sentence had been handed down in Judge Joyce's chambers hours after I had left the courtroom.

[fol. 29] Someone, I believe it was the Asst. U.S. Attorney, had at that time pointed out to him that he had neglected to sentence me. I wish to add at this point that I do not have a transcript of that hearing but, as God is my witness, these facts are the truth. Further conversation with Mr. Lee at this time led me to believe that it would not be wise for me to pursue the matter further. I had no knowledge as to what further complications I could or might become involved in.

On September 21, 1954, I was again brought before the Honorable Matthew M. Joyce in the U.S. District Court in Minneapolis, Minn., for violation of Probation. Judge Joyce stated that my three (3) year probationary sentence was set aside and sentenced me to two (2) years incarceration in a Federal Penal Institution.

That foregoing are the true and basic facts regarding my case and the following, briefly, are my contention. I believe that they are logical and justifiable.

1. I was at no time legally sentenced to the three (3) year probationary sentence.

2. Since I was never legally sentenced to the three (3) year probationary sentence, my present sentence of two

(2) years' incarceration for violation of probation is entirely illegal and unconstitutional.

3. I believe that it is illegal and unconstitutional to sentence an American citizen in absentia; as has been indicated from the records as shown to me in my case as having been done in my case.

4. I believe I should be immediately released from my present state of incarceration.

I wish to also add the following information for the court's consideration. In Judge Joyce's denial, dated March 23, 1955, of my original Motion to Vacate Sentence and Judgment, he completely ignores and avoids the basic and fundamental point of my Motion—That I was never legally sentenced to the three (3) year probationary sentence on October 3, 1952, and that consequently my present two (2) year sentence for violation of probation is illegal. Rather, Judge Joyce states, in part: "Defendant was *initially* sentenced upon *September 21, 1954.*" If I have interpreted that statement correctly, it would seem that Judge Joyce wishes to infer that my appearance in his court on that date was my first—that he chooses to ignore, or wishes to avoid reference to my appearance before him on October 3, 1952. At which time I was supposed to have [fol. 30] been sentenced to the probation. In neither of Judge Joyce's denials to me—of my Motion to Vacate Sentence, and Judgment and my Affidavit and Motion for leave to Appeal—does he give me any reason for his denial. He does not state that they are with or without merit—He simply states that they are denied. I cannot help but feel that Judge Joyce realized his error in my case and that he has attempted to discourage me in order to forestall any further action on my part. I honestly feel I have been unjustly and unfairly treated in this matter and I sincerely hope and pray that your acceptance of this letter as an appeal in Forma Pauperis, and your subsequent study of my case, will result in a complete and favorable clarification of it for me.

May I again please respectfully request that although this may not be a correct form, it be taken into consider-

ation that I am a layman and unlearned at law, and that this be filed as an Appeal in Forma Pauperis.

Thanking you sincerely, I am,
Very respectfully, Thomas E. Pollard, 71589, Appellant.

County of Leavenworth,
State of Kansas, ss:

Subscribed and sworn to before me on this day of — May, 1955. (S.E.A.L.) My commission expires May 21, 1957. Edward O. Doughty, Notary Public.

[fol. 31] County of Leavenworth,
State of Kansas, ss.

Affidavit in Forma Pauperis

Thomas E. Pollard, layman and unlearned at law, being duly sworn according to law, deposes and says; That he is appellant in entitled action; that he is a citizen of the United States by virtue of birth; that he is a poor and indigent person at this time and because of his poverty he is unable to pay the cost of said action or to give security thereof: Appellant believes he is entitled to the redress he seeks in such action, and said action is taken in good faith.

For such appellant will ever pray.

Thomas E. Pollard, Appellant.

Subscribed and sworn to before me on this 16th day of May, 1955. Edward O. Doughty, Notary Public. My commission expires May 21, 1957. (Seal.)

[fol. 32] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1954

[Title omitted]

ORDER DENYING MOTION FOR APPEAL IN FORMA PAUPERIS—June 23, 1955

This matter is before the Court on "Motion for Appeal in Forma Pauperis" from an order of the United States District Court for the District of Minnesota denying Motion to vacate judgment and sentence of March 23, 1955. The United States District Judge denied leave to appeal in forma pauperis.

The Court has examined the original files of the United States District Court and after due consideration the motion for appeal in forma pauperis is denied.

The filing of the Motion will be without prepayment of costs in this Court.

June 23, 1955.

[File endorsement omitted.]

[fol. 33] IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

[Title omitted]

MOTION AND AFFIDAVIT TO FILE AND TO PROCEED IN FORMA PAUPERIS—Filed July 11, 1955

Comes now, Thomas E. Pollard, Petitioner, and moves this Honorable Court to enter an Order directing the Clerk of the Court and the Court Reporter, to prepare and furnish Petitioner the Transcript and Records of Testimony in the above-numbered case as heard and recorded at Petitioner's hearings before this Honorable Court on the following dates:

1.) October 3, 1952
2.) September 21, 1954.

These Records are necessary so that Petitioner will have a true and complete record of the action taken in Petitioner's case on the above stated dates. Petitioner contemplates further action in his case and said Transcript and Records are necessary to properly prepare and prosecute same.

Petitioner respectfully shows that he is a poor and indigent person and that he cannot pay the costs and expense to obtain the above mentioned Transcript and Records or to give security thereof.

Respectfully submitted, Thomas E. Pollard, Petitioner.

County of Leavenworth,
State of Kansas, ss.

Subscribed and sworn to before me this 8th day of July, 1955. Edward O. Doughty, Notary Public. My commission expires May 21, 1957. (Seal.)

[fol. 34] County of Leavenworth,
State of Kansas, ss.

Affidavit in Forma Pauperis

Thomas E. Pollard, layman and unlearned at law, being duly sworn according to law, deposes and says; that he is Petitioner in entitled Action; that he is a citizen of the United States by virtue of birth; that he is a poor and indigent person at this time and because of his poverty he is unable to pay the cost of said Action or give security thereof; Petitioner believes he is entitled to the Action he seeks in entitled Action, and said action is taken in good faith.

For such Petitioner will ever pray.

Thomas E. Pollard, Petitioner.

Subscribed and sworn to before me this 8th day of July, 1955. Edward O. Doughty, Notary Public. My commission expires May 21, 1957. (Seal.)

[File endorsement omitted.]

[fol. 35] In United States District Court, District of Minnesota, Fourth Division

[Title omitted]

Order Re Furnishing Record—August 8, 1955

This matter is before the court on the motion of defendant Thomas E. Pollard for an order directing the Clerk of this Court and the Court Reporter to prepare and furnish, without cost to petitioner, the transcript of hearings in this case. The court having given consideration to said motion,

Orders, that the same be and it hereby is in all respects denied.

Matthew L. Joyce, United States District Judge.

Dated Aug. 8, 1955.

[File endorsement omitted.]

[fol. 36] In the United States District Court, District of Minnesota, Minneapolis, Minn.

[Title omitted]

Motion and Affidavit to File and to Proceed in Forma Pauperis—Filed December 12, 1955

Comes now, Thomas E. Pollard, Petitioner, and moves this Honorable Court to enter an order directing the clerk of the court to prepare and furnish petitioner transcripts of judgements and commitments of the above numbered case as entered by this Honorable Court following petitioners trials before this Honorable Court on October 3, 1952, and September 21, 1954.

Petitioner is in receipt of the memorandum, case No. 137 Misc., filed in the United States Supreme Court, October term, 1955, on November 15, 1955. Because of the substantial content of said memorandum, petitioner desires to prepare and initiate further action in his case, and said transcripts are necessary so that petitioner may properly do so.

Petitioner respectfully shows that he is a poor and indigent person and that he cannot pay the costs and expense to obtain the above mentioned transcripts or to give security thereof.

Petitioner respectfully states that he is taking this action in good faith.

Respectfully submitted, Thomas E. Pollard.

County of Leavenworth,
State of Kansas, ss.

Affidavit in Forma Pauperis

Thomas E. Pollard, layman and unlearned at law, being duly sworn according to law, deposes and says that he is petitioner in entitled action, that he is a citizen of the United States by virtue of birth, that he is a poor and indigent person at this time and because of his poverty he is unable to pay the cost of said action or to give security thereof. Petitioner beleives he is entitled to the order he seeks in entitled action, and said action is takken in good faith. For such Petitioner will ever pray.

Thomas E. Pollard.

Subscribed and sworn to before me this 8th day of December, 1955. L. E. Daggett, Parole Officer.

[File endorsement omitted.]

[fol. 37] United States District Court, District of Minnesota, Fourth Division

[Title omitted]

Order—December 29, 1955

The above-named defendant has filed a petition with the Clerk of this Court as of December 12, 1955, wherein he seeks an order directing the Clerk to prepare and furnish

him transcripts of judgments and commitments entered by this Court on October 3, 1952, and September 21, 1954.

It appears from the record that on March 23, 1955, Judge Joyce denied defendant's motion to vacate the judgment and sentence entered on September 21, 1954, said motion being made under Section 2255, Title 28, United States Code. On April 4, 1955, defendant filed a motion for leave to proceed on appeal in forma pauperis. This motion was likewise denied by Judge Joyce on April 18, 1955. On June 23, 1955, the United States Court of Appeals for the Eighth Circuit denied defendant's motion for leave to appeal in forma pauperis. On August 8, 1955, Judge Joyce filed an order denying a petition for transcripts of commitments in this matter. Consequently, it appears that substantially the same motion as that denied on August 8, 1955, is again being presented. In view of Judge Joyce's illness, the petition filed December 12, 1955, was referred to the undersigned.

It seems that all of these proceedings stem from the claim of the defendant that he is now illegally incarcerated in the United States Penitentiary at Leavenworth, Kansas. It appears that the defendant was charged by an information of embezzlement of a United States check, in violation of 18 United States Code, Section 1702. He entered a plea of guilty on September 8, 1952. He was before Judge Joyce for sentence on October 3, 1952, but he contends that on that date when the Court suspended the imposition of any sentence and placed him on probation for a period of three years he was not present in court and hence any probationary sentence was invalid. On October 3, 1952, he was incarcerated in Stillwater and the order of probation provided that the probationary period should commence upon his release from that institution. He was released from Stillwater on November 26, 1952, and it appears that he was under the supervision of the United States probation officer of this Court upon his release and remained on probation until September 21, 1954. On that date he was before Judge Joyce charged with violation of his probation, and after hearing, the Court revoked his probation and sentenced him to two years in a federal penitentiary.

The petitioner contends that his probationary sentence

was invalid because he was not present in court when any order of probation was made. He concludes, therefore, that when he was before the Court on September 21, 1954, and his probation was revoked and he was sentenced to two years, that that sentence was invalid. However, if it be assumed, as he contends, that his probationary sentence on [fol. 38] October 3, 1952, was invalid, it merely resulted in an absence of any valid sentence upon his plea of guilty which he entered on September 8, 1952. The Court did not thereby lose jurisdiction to impose a valid sentence, and hence when he was before the Court on September 21, 1954, and sentenced to a two-year term, that sentence and the judgment entered thereon were valid. Regardless, therefore, of his claim that his probationary sentence was invalid, there is no basis for his contention that the Court did not have jurisdiction to impose a valid sentence on September 21, 1954.

After due consideration of the entire record, the motion of the defendant filed herein on December 12, 1955, is in all things denied. It is so ordered.

Dated this 29th day of December, 1955.

By the Court: Emmett Moody, Chief Judge.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

For U. S.:

Ronald E. Hachey, Ass't. U. S. Attorney.

For Defendant:

No Counsel.

1 Count

Vio. 18 USCA 1702—Embezzlement of U. S. check.

DOCKET ENTRIES

1952

Sept. 8—Filed Waiver of Indictment.

Sept. 8—Filed Information.

Sept. 8—Entered arraignment and plea of guilty; imposition of sentence deferred for pre-sentence investigation.

Sept. 10—Filed Writ of Habeas Corpus Ad Prosequendum with Marshal's return.

Oct. 1—Filed and Petition and Order for Writ of Habeas Corpus Ad Prosequendum (Bell, J.) and issued same in St. Paul, Minn.

Oct. 3—Filed Writ of Habeas Corpus Ad Prosequendum, with Marshal's return of service on Warden, Stillwater, Minn. 10-2-52.

Oct. 3—Filed and entered Judgment and Order of Probation: imposition of sentence suspended, 3 years probation to commence immediately after his release from Stillwater, Minnesota. (Joyce, J.). Made copies of Probation Order for Probation Officer.

Dec. 6—Filed Commissioner's Warrant of Arrest & Complaint. (Lundquist)

1954

Sept. 1—Filed and entered Order for Warrant of Arrest. (Joyce, J.)

Sept. 1—Issued Warrant of Arrest.

Sept. 15—Filed Bench Warrant & issued Clerk's temporary commitment.

1954

Sept. 21—Filed and entered Judgment and Commitment: 2 years—no rec. (Joyce, J.)

Sept. 21—Entered Order that the Judgment and Order of Probation made and entered on October 3rd, 1952, is hereby set aside. (Joyce, J.)

Sept. 21—Made copies of Jdgt. & Commitment for U. S. Marshal.

Oct. 14—Filed copy of Jdgt. & Commitment with marshal's return thereon.

Dec. 6—Filed clerk's temporary commitment with marshal's return thereon.

1955

Febr. 11—Filed Petition for Motion to vacate sentence judgment under Sec. 2255, Title 28, USCA to proceed in forma paupefis.

Mar. 23—Filed & entered Order denying motion to vacate judgment and sentence under Sec. 2255, Title 28, USCA and to proceed in forma pauperis.

Apr. 4—Filed affidavit and motion for leave to proceed on appeal in forma pauperis.

Apr. 18—Filed and entered order denying motion for leave to proceed in forma pauperis. (Joyce, J.)

[fols. 40-41] June 23—Filed and entered Order (copy) from U. S. Court of Appeals with reference to the motion denying motion to vacate judgment and sentence of March 23, 1955. The United States District judge denied leave to appeal in forma pauperis, and after due consideration the motion for appeal in forma pauperis is denied by U. S. Court of Appeals.

July 11—Filed motion and affidavit to file and to proceed in forma pauperis.

Aug. 8—Filed and entered Order denying the motion made by Deft. directing that the clerk and court reporter prepare and furnish without costs to the petitioner transcripts of hearings in this case (Joyce, J.)

Dec. 12—Filed motion and affidavit to file and proceed in forma pauperis.

Dec. 29—Filed and entered Order denying motion to file and proceed in forma pauperis. (Nordbye, J.)

1956

Mar. 13—Filed letter of request from Clerk of Supreme Court of the United States, Washington, D. C., for file to be mailed with Court's approval thereon. (Nordbye, J.)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING CERTIORARI—February 27, 1956

On petition for writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 714 and placed on the summary calendar.

February 27, 1956.

(9080-3)

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FILED
AUG 24 1956
JOHN T. FEY, Clerk

No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1956

THOMAS E. POLLARD, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

BENNETT BOSKEY,
1701 K Street, N. W.,
Washington 6, D. C.,
Counsel for Petitioner,
(Appointed by this Court).

AUGUST 24, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 38

THOMAS E. POLLARD, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

There are no opinions below, except to the extent that statements of grounds are included in the various orders which were entered respectively by the district court (R. 16-17, 18, 26, 27-29) and by the court of appeals (R. 24). The orders of both courts are unreported.

JURISDICTION

This is a proceeding to vacate a sentence imposed in a federal criminal case. The order of the court of appeals, denying petitioner's motion for leave to appeal in forma

pauperis from the district court's denial of his motion to vacate, was entered on June 23, 1955 (R. 24). The petition for writ of certiorari, together with a motion to proceed in forma pauperis, was filed in this Court on July 8, 1955. Thus the petition for certiorari was timely, regardless of whether the thirty-day period of Rule 22, paragraph 2, of the Rules of this Court is applicable to the case, or whether, as would appear to follow from this Court's decision in *United States* v. *Hayman*, 342 U.S. 205, 209 note 4 (1952), the ninety-day period of 28 U.S.C. § 2101(e) is applicable. Jurisdiction exists under 28 U.S.C. §1254(1), see *Hiatt* v. *Brown*, 339 U.S. 103, 106, note 1 (1950), as well as under 28 U.S.C. § 1651(a), see *Holiday* v. *Johnston*, 313 U. S. 342, 348, note 2 (1941); *Steffler* v. *United States*, 319 U.S. 38 (1943); *Adkins* v. *DuPont Co.*, 335 U.S. 331 (1948). This Court granted certiorari on February 27, 1956.

QUESTIONS PRESENTED

In September 1952 petitioner pleaded guilty to an offense charged under 18 U.S.C. §1702, a statute which provides that offenders shall be fined not more than $2,000 or imprisoned not more than five years, or both. When petitioner was brought before the court for sentencing on October 3, 1952, the trial judge—on the only rational interpretation of the record which seems open—determined that no imprisonment and no probation should be imposed on petitioner. Later that day, however, at the urging of the Government, and without bringing petitioner back before the court, the trial judge purported to determine instead that petitioner should be placed on probation for three years. The Solicitor General has conceded that this purported probation order, pursuant to which petitioner was subjected to nearly two full years of probation surveillance, was invalid. In September 1954 petitioner was brought back before the trial judge because of alleged violation of

the purported probation, and was thereupon sentenced to two years imprisonment for the original offense. After being sent off to prison petitioner filed a motion to vacate the prison sentence. The denial of his motion, which is now being reviewed, presents the following questions:

1. Whether the imposition of a prison sentence in September 1954 violated the Double Jeopardy Clause of the Fifth Amendment, in view of the previous determination of the trial judge, when petitioner was present in open court on October 3, 1952, that no imprisonment and no probation should be imposed.

2. Whether the imposition of a prison sentence in September 1954, such a long time after the plea of guilty entered in September 1952, violated petitioner's constitutional right under the Sixth Amendment to a speedy trial.

3. Whether the imposition of a prison sentence in September 1954 deprived petitioner of his liberty in violation of the Due Process Clause of the Fifth Amendment.

4. Whether, even apart from constitutional considerations, the imposition of a prison sentence in September 1954 was, under the circumstances disclosed by this record, such a serious departure from proper standards of criminal law administration as to require corrective action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides, in part:

"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor

be deprived of life, liberty, or property, without due process of law;''

2. The Sixth Amendment to the Constitution of the United States provides, in part:

''In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .''

3. The statute, 18 U.S.C. §1702, defining the offense to which petitioner pleaded guilty, provides:

''Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.''

4. Rule 32 of the Federal Rules of Criminal Procedure provides, in part:

''(a) Sentence. Sentence shall be imposed without unreasonable delay. . . .

* * * * * * *

''(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.''

5. Rule 45(c) of the Federal Rules of Criminal Procedure provides:

"Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding."

6. The federal probation statute provides in part (18 U.S.C. §3651):

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

"Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

"The court may revoke or modify any condition of probation, or may change the period of probation.

"The period of probation, together with any extension thereof, shall not exceed five years."

It also provides in part (18 U.S.C. §3653):

"As speedily as possible after arrest the probationer shall be taken before the court for the district having

jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

STATEMENT OF THE CASE

On February 11, 1955, pursuant to 28 U.S.C. §2255, petitioner filed in the District Court for the District of Minnesota (Minneapolis Division) a motion to vacate the sentence and judgment by virtue of which he was then imprisoned in the United States Penitentiary at Leavenworth (R. 13-16). The question now presented is whether the denial of this motion to vacate, without any hearing whatsoever, was justified.

The facts of the case are relatively simple. They are also very disturbing, for they reflect extremely loose and unfair practices in the administration of the criminal law.

On July 17, 1951, a complaint was filed against petitioner in the District Court for the District of Minnesota, alleging a violation of 18 U.S.C. §1702, a statute which makes offenders subject to a fine of not more than $2,000 or imprisonment for not more than five years or both. The violation alleged was that on or about May 21, 1951, petitioner had taken a letter from the mail and had opened the letter and removed the [illegible] from a U. S. Treasury check in the amount of $192.29 (R. 2). On September 8, 1952, petitioner waived indictment (R. 3). On the same day an information was filed charging him with the offense and petitioner pleaded guilty, imposition of sentence being deferred by Judge Joyce for pre-sentence investigation (R. 3-4, 30).

Several weeks later, on October 3, 1952, the case came on before Judge Joyce for sentencing (R. 4-6). The transcript shows that the judge had been informed by the pre-sentence

report that petitioner was at that time serving a sentence in the Minnesota State Prison at Stillwater, Minnesota, from which petitioner was scheduled to be paroled in the near future. At the hearing the Government was represented by Ronald E. Hachey, Esq., Assistant United States Attorney (R. 4). Petitioner appeared without counsel; indeed, petitioner has appeared without counsel at all stages of this case (R. 4, 6, 11, 12, 15, 17, 23, 25, 27) until this Court, subsequent to the granting of the petition for writ of certiorari, appointed petitioner's present counsel.

The case in its present posture turns largely on a clear understanding of just what occurred at this hearing on October 3, 1952, during the time while petitioner was present. Since the transcript itself is reasonably short, it will be set forth in full. What it shows is the following (R. 4-6):

"Mr. Hachey: Next matter is United States versus Thomas E. Pollard. This matter is here for sentencing, your Honor. At this time the Government moves for sentencing of the defendant.

"The Court: You are presently in Stillwater?

"The Defendant: Yes, sir.

"The Court: How long have you been there?

"The Defendant: Thirteen months, sir.

"The Court: Have you any craving or desire for a drink now?

"The Defendant: None whatsoever.

"The Court: You are about 35?

"The Defendant: Yes, sir.

"The Court: I suppose that you are an age where you realize now the futility, don't you?

"The Defendant: Yes, very much so, your Honor.

"The Court: The report shows that you have taken a very active interest in the AA organization in the prison.

"The Defendant: I have, sir.

"The Court: And that you contemplate doing that when you get out?

"The Defendant: I do.

"The Court: The report also shows that you won't get out until 1953 sometime.

"The Defendant: December, 1953 is my discharge date.

"The Court: When do you have an opportunity for going before the parole?

"The Defendant: Next month—I was given *given* three months in August, a three month waiting term, period, in August.

"The Court: There was one thing you did, as shown in this probation report, which appealed to me. I realize that you had been on a protracted spree when you stole this government check, but when you sobered up long enough to understand what you had done, you went to one of the officers of the Alcoholics Anonymous and told him what you had done and you sought to make amends insofar as you then could do. You told the FBI the circumstances, without any effort on your part to minimize the offense; in fact you had been drinking for some two weeks continually.

"You are now 35 years of age.

"The Defendant: Yes, sir.

"The Court: You ought to know the misery and the grief and the sorrow and the horror of what continued drinking on your part will bring to you.

"If I might suggest to you, and I am giving you gratuitous advice but it is the result of observation and experience—it is my view that when you get out you should immediately join the Alcoholics Anonymous organization—not wait a week or two weeks or three

weeks—but have that your first mission after you contact your family, and do what they tell you to do and do it immediately and do it diligently and faithfully, carry out every obligation that they impose upon you. With your background and with your ability I think that you can win this fight.

"If you don't do those things, and if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.

"So, good luck to you and I hope the parole board will you give you an opportunity.

"That is all.

"The Defendant: Thank you very much, sir."

From the transcript alone it is clear that this is the entire proceeding which occurred while petitioner was present, for the transcript then goes on to state (R. 6):

"(Other criminal matters were then presented to the Court.)"

Thus the transcript not merely fails to refute, but instead it furnishes confirmation for, the allegations set forth in petitioner's motion to vacate, to the effect that (R. 13):

"at no time or in any instance in the petitioner's presence did Judge Joyce cite, refer or allude to or specify a sentence of any nature or description. Petitioner further states that he, as well as his wife, a close and interested personal friend and two officials of the Minn. State Prison who were all present in the court-room, was under the impression that petitioner's case was dismissed in that no sentence was handed down and petitioner was not remanded for a further hearing."

There is nothing in the record which in any way challenges these factual allegations of petitioner's motion to vacate; indeed, the latest order of the district court, dated December 29, 1955 (which denied petitioner's application to be furnished certain transcripts for use in connection with the petition for certiorari then pending in this Court) assumes what petitioner says to be true (R. 29).

Accordingly, to sum up what happened while petitioner was present in court on October 3, 1952, the judge carefully considered petitioner's case and his history. Having done so, the judge imposed neither a sentence of imprisonment nor probation. Instead the record—on the only rational interpretation of it that seems open—shows that the judge decided that when petitioner should emerge shortly thereafter from the Minnesota State Prison at Stillwater, petitioner was to be a free man so far as the federal authorities were concerned. The judge did, however, expressly admonish petitioner against committing some new federal offense, saying (as shown above) that if petitioner reverted to drink petitioner would be back "because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again." The judge did not say that petitioner might be back for violation of probation, nor in any other way allude to probation or to suspending the imposition of sentence for the purpose of putting petitioner on probation. Thus it is perfectly evident from the record that the judge had no intention to put petitioner on probation.

But although the transcript (as shown above) makes it clear that Judge Joyce ended by saying to petitioner "That is all", nevertheless this was not all which occurred in court on October 3, 1952, relating to petitioner's case. Later in the day, after petitioner was no longer present in court, the Assistant United States Attorney, acting *ex parte*, prompted the judge into having a second and entirely

different thought about the matter, and in petitioner's absence the judge then purported to determine that petitioner should be put on probation. According to petitioner's motion to vacate, this further action by the court first came to petitioner's attention in the following manner (R. 13-14):

> "Petitioner states that he was paroled from the Minn. State Prison on the day before Thanksgiving, 1952 and at this time was informed by prison officials that he was to report to the Federal Probation Office in Minneapolis, Minn. When petitioner inquired of the prison officials as to why it was necessary for him to report to said office he was informed that they did not know but that they would investigate. After the prison officials had conversed by telephone with the federal probation office in Minneapolis, petitioner was notified that, although petitioner *was not present at time of sentencing,* and *entirely* (until this time) *unknown to him,* he had been 'sentenced' to three (3) years probation . . ."

These allegations in petitioner's motion to vacate have not been denied, nor are they contradicted by anything in the record. On the contrary, they are supported by the certified transcript, which shows that, after petitioner's hearing on October 3, 1952, had been concluded, the court turned to other criminal matters, and then later in the day was brought back to petitioner's case, as follows (R. 6):

> "(Other criminal matters were then presented to the Court).
>
> "The Court: Is there anything else, Mr. Hachey?
>
> "Mr. Hachey: Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary

period after his release from Stillwater, or any type of sentencing?

"The Court: It is to commence at the expiration of sentencing at Stillwater.

"Mr. Hachey: Probation to commence after expiration of his sentencing at Stillwater—for how long?

"The Court: Three years."

The record likewise includes a purported "Judgment and Order of Probation", dated October 3, 1952, which contains the following (R. 6-8):

> "It is adjudged that imposition of sentence be, and the same is hereby suspended, and defendant is placed on probation to the United States Probation Officer for a period of three (3) years; said probation to commence immediately after his release from Stillwater Penitentiary, Stillwater, Minnesota.
>
> "It is further ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.
>
> "It is further rdered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer."

There is no showing that a copy of this order was ever delivered to petitioner. In any event, this "Judgment and Order of Probation" was obviously invalid; the Solicitor General has already so admitted in this Court (Memorandum for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari, page 3), although the Solicitor General apparently takes the view (contrary

to petitioner's) that the sole ground of invalidity is that petitioner was not present in court when the judgment was pronounced.[1]

Petitioner's motion to vacate alleges, and it is nowhere denied or contradicted, that petitioner, when he initially reported to the federal probation officer, inquired how he could possibly be on probation; that the probation officer succeeded in convincing petitioner that the "sentence" was legal; that petitioner again brought up the question with the probation officer about a year later; that the probation officer, after looking into it, informed petitioner that petitioner's allegations were "entirely true"; that further conversation with the probation officer led petitioner to believe that it would not be wise to pursue the matter further, petitioner having no knowledge as to what further complications he might or could become involved in (R. 14).

On September 1, 1954, nearly two full years after the hearing of October 3, 1952, and on the basis of a report from the federal probation officer that petitioner had violated the terms of his probation,[2] Judge Joyce directed that petitioner be arrested and brought before the court (R. 8-9). Petitioner was accordingly arrested on September 15, 1954 (R. 10) and was brought before Judge Joyce for a hearing

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[1] "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with." *Schwab* v. *Berggren*, 143 U.S. 442, 448 (1892). For cases coming up from State courts under the Fourteenth Amendment, a narrow, specific exception (in a situation where the jury is taken out for a view) was made to this rule, by a bare majority of this Court, in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), but neither in the *Snyder* opinion nor elsewhere has it been suggested that a sentence could constitutionally be imposed by the trial court in the absence of the accused.

[2] Petitioner's motion to vacate states this was "because of petitioner's excessive drinking" (R. 14).

on September 21, 1954 (R. 11). At the hearing the Government was represented by Harold Evarts, Esq., Assistant United States Attorney; petitioner, as before, was not represented by counsel (R. 11). The proceedings were extremely brief. In their entirety they consisted of the following:

> "Mr. Evarts: If it please the Court, the first matter is United States vs. Thomas E. Pollard. The defendant, Your Honor, is before the Court at this time and is not represented by counsel, is that correct?
>
> "The Defendant: That's correct.
>
> "Mr. Evarts: You understand you have the right to be represented by counsel?
>
> "The Defendant: Yes, sir, I do.
>
> "Mr. Evarts: Is it your desire to waive that right?
>
> "The Defendant: Yes, sir. It is.
>
> "The Court: What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.
>
> "Mr. Evarts: Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.
>
> "The Court: All right."

From the foregoing it will be seen that the judge paid scant regard to the standards prescribed for such a proceeding. For example, he allowed the Assistant United States Attorney to elicit by a question the answer that petitioner desired

to waive the right to counsel, but (contrary to what is contemplated by Rule 44 of the Federal Rules of Criminal Procedure) the judge himself neither informed petitioner of his right to counsel nor informed petitioner that the court would assign counsel to represent petitioner unless petitioner elected to proceed without counsel or was able to obtain counsel.[3] Furthermore, the judge totally ignored the mandatory requirement of Rule 32(a) of the Federal Rules of Criminal Procedure, to the effect that: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."[4] In addition, the judge completely disregarded the principle embodied in Rule 37(a)(2) of the Federal Rules of Criminal Procedure, which specifies that: "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal. . . ." But worse than all these things, the judge imposed a two-year prison sentence when, for the reasons

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[3] Thus the transcript shows conclusively the inaccuracy of the formal recital which appears in the court's judgment and commitment, dated September 21, 1954, to the effect that "the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court . . . ." (R. 12).

[4] Compare *Couch* v. *United States*, Nos. 12972-3, decided June 7, 1956, by the United States Court of Appeals for the District of Columbia Circuit. Thus the transcript also conclusively shows to be untrue the further formal recital, on the printed form (Cr. Form No. 25d) used for the court's judgment and commitment, dated September 21, 1954, to the effect that "the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court" (R. 12). It apparently takes considerably more than a printed form of court order to carry into effect the specific safeguards which the Federal Rules of Criminal Procedure are intended to make a living reality for all defendants in federal criminal cases.

which will be set forth in this Brief, it was no longer within the judge's power to do so.

The record also shows that later in the day on September 21, 1954, in keeping with what he had done at this hearing, Judge Joyce signed a formal judgment and commitment (R. 12), sentencing petitioner to two years' imprisonment and setting aside the judgment and order of probation which had been entered on October 3, 1952.

On February 11, 1955, petitioner, stating that he was a layman, unlearned in the law and begging the Court's indulgence in the matter of form, filed his motion to vacate (R. 13-15). The significant factual allegations in the motion, as well as the court records pertaining to them, have been recited above. In his motion petitioner contended that he was at no time sentenced to the three years' probationary sentence; that his two-year prison sentence was illegal and unconstitutional; that he should be immediately released; and that it is illegal and unconstitutional to sentence an American citizen "in absentia" and without affording him an opportunity to speak in his own behalf (R. 15). By order dated March 23, 1955, without holding any hearing, Judge Joyce denied the motion to vacate, finding that petitioner "was initially sentenced upon September 21, 1954, and the files and records in the case conclusively show that said judgment was within the jurisdiction of the court and the sentence imposed was valid and in accordance with law" (R. 16-17).

On April 4, 1955, there was filed in the district court petitioner's notice of appeal [5] and also his motion for leave to

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[5] There is no question that the appeal was timely, having been filed within the sixty-day period applicable to habeas corpus cases, since as this Court decided in *United States* v. *Hayman*, 342 U.S. 205, 209, note 4 (1952): "Appeals from orders denying motions under § 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions. See Mercado v.

appeal in forma pauperis (R. 17-18); such leave was denied by Judge Joyce on April 18, 1955 (R. 18). Thereafter petitioner moved, in the Court of Appeals for the Eighth Circuit, for leave to prosecute his appeal in forma pauperis (R. 19-23). On June 23, 1955, stating that "The Court has examined the original files in the United States District Court", the court of appeals entered an order denying the motion (R. 24). The petition for a writ of certiorari was filed in this Court on July 8, 1955. On February 27, 1956, this Court granted leave to proceed in forma pauperis and granted the petition for writ of certiorari (R. 32). 350 U.S. 965. On March 5, 1956, this Court appointed petitioner's present counsel to serve as counsel in the case. 350 U.S. 980.

Later in March 1956, on the basis of the good-time credits he had earned, petitioner was released from Leavenworth and the service of his sentence was deemed completed.[6]

SUMMARY OF ARGUMENT

The record in this case discloses an extraordinary disregard of the principles which govern the sound and fair

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United States, 183 F.2d 486 (1st Cir. 1950)." Indeed, even if the shorter ten-day period of Rule 37 (a) (2) of the Federal Rules of Criminal Procedure had been applicable (which, under the *Hayman* decision, it plainly was not), petitioner's appeal would still have been timely, since on March 31, 1955, well within the ten-day period, petitioner, being then in custody in the United States Penitentiary at Leavenworth, Kansas, executed his appeal papers before a notary public at that institution for transmission to the court (R. 17-18). See *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951), and cases cited.

[6] Under the decisions of this Court it is clear that this fact does not make the case moot. *Fiswick* v. *United States*, 329 U.S. 211, 220-223 (1946); *United States* v. *Morgan*, 346 U.S. 502, 512-513 (1954). As the Court said in the *Morgan* case, "the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected" (346 U.S. at 512-513).

administration of the criminal law. The imposition of a prison sentence upon petitioner in September 1954 involved serious violations of his constitutional rights, requiring a reversal of the judgment, although it may be more appropriate for the case to be decided in petitioner's favor without actually reaching the constitutional grounds.

The constitutional grounds rest upon three separate clauses of the Constitution—the Double Jeopardy Clause of the Fifth Amendment, the Speedy Trial Clause of the Sixth Amendment, and the Due Process Clause of the Fifth Amendment.

First, as to double jeopardy: It was a violation of the Double Jeopardy Clause for the district court in September 1954 to impose a prison sentence on petitioner after having previously determined in October 1952 that petitioner should not be subject to imprisonment or probation for the offense committed under 18 U.S.C. § 1702. Unlike certain other statutes, the statute which is here involved, 18 U.S.C. § 1702, does not fix some minimum penalty which limits the trial court's discretion; the statute says instead that the offender shall be fined not more than $2,000 or imprisoned not more than five years, or both. The statute thus does not purport to require that the judge impose any term of imprisonment, or any term of probation in lieu of imprisonment; no minimum penalty is prescribed by law. Accordingly, the judge's determination, made when petitioner was present in open court on October 3, 1952, that no imprisonment and no probation should be imposed, was a judgment lawfully disposing of the case; by its very nature, it was a judgment executed immediately; and thereafter it was beyond the judge's authority to modify the judgment in a manner adverse to petitioner. The Double Jeopardy Clause clearly affords protection against a second and more severe sentencing, just as it affords protection against a

second trial for the same offense, and it stood as a bar to the prison sentence imposed in September 1954.

Second, as to the Speedy Trial Clause: The Solicitor General has already acknowledged that the purported probation order of the district court, pronounced and entered in October 1952 at a time when petitioner was no longer present before the district court, was invalid. However, the Solicitor General has suggested that, even if this invalid order is totally disregarded and treated as a nullity, the case would then merely have been an uncompleted case on the docket of the district court, which that court had power to complete by pronouncing sentence "initially" in September 1954. But such a lapse of two full years between the date of plea of guilty and the date of sentence would constitute not merely an inexcusable violation of Rule 32(a) of the Federal Rules of Criminal Procedure, which directs that sentence be imposed without unreasonable delay; it also would constitute a grave violation of petitioner's right under the Sixth Amendment to a "speedy trial". Both the purpose and the plain meaning of the Speedy Trial Clause of the Sixth Amendment support the conclusion that the sentencing hearing is an integral part of the "trial", as the word "trial" is used in this important clause of the Bill of Rights. In the present case the undisputed facts show that no justification existed for such an extraordinary delay, and that because of the unconscionable lapse of time the proceedings should have been brought to a halt without imposing a prison sentence on petitioner.

Third, as to the Due Process Clause: On any possible interpretation of the facts recited in detail in the Statement of the Case, it is evident that the Government and the district court indulged in a course of conduct not merely irregular but highly arbitrary and unfair. This course of conduct, for which the district court and the Government together must share the responsibility, cannot be deemed

consistent with principles of fundamental fairness. When petitioner was brought back before the district court in September 1954, after having been kept unlawfully under probation surveillance for nearly two full years, it should have been plain to the district court that the fundamental principles of justice required that petitioner be released rather than sentenced to prison.

The foregoing is an outline of the constitutional grounds on which petitioner is entitled to prevail. Even apart from these constitutional considerations, however, the imposition of a prison sentence upon petitioner in September 1954 was such a serious departure from proper standards of criminal law administration as to require corrective action. Petitioner's case has been characterized, practically from beginning to end, by the use of exceptionally illegal procedures employed in a manner adverse to his interests, as well as by the virtually total disregard of vital safeguards made mandatory by the Federal Rules of Criminal Procedure. Time and again this Court has held that in federal criminal cases the federal courts must be concerned with more than merely the bare minimum standards required by the Constitution. Because this case discloses such far-reaching departures from proper standards of criminal law administration, and because the application of proper standards would have prevented the imposition of a prison sentence on petitioner in September 1954, a compelling basis exists for reversing the judgment without even reaching the constitutional grounds which are being urged.

ARGUMENT

I

BY VIRTUE OF THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY, IT WAS UNCONSTITUTIONAL FOR THE DISTRICT COURT IN SEPTEMBER 1954 TO IMPOSE A PRISON SENTENCE ON PETITIONER AFTER HAVING PREVIOUSLY DETERMINED IN OCTOBER 1952 THAT PETITIONER SHOULD NOT BE SUBJECT TO IMPRISONMENT, OR TO PROBATION IN LIEU OF IMPRISONMENT, FOR THIS OFFENSE.

The disposition of petitioner's case which was made when petitioner appeared in open court on October 3, 1952, has already been set forth in full (pages 6-10, above). From the facts recited it is clear that the trial judge in open court determined that neither imprisonment nor probation should be imposed upon petitioner. For reasons which the judge deemed sufficient, he made a decision in open court to leave petitioner free of both imprisonment and the threat of imprisonment for this offense. And it is the judge's determination as made in open court which constitutes the authoritative disposition of petitioner's case; as held in *Spriggs* v. *United States*, 225 F.2d 865, 868 (9th Cir. 1955), "The order of the court is the pronouncement made by the judge in open court." Accord: *Watkins* v. *Merry*, 106 F.2d 360, 361 (10th Cir. 1939); *Wilson* v. *Bell*, 137 F.2d 716, 720 (6th Cir. 1943); *United States* v. *Whitehead*, 64 F. Supp. 57, 58 (E.D. Ky. 1946).

It was plainly within the lawful authority of the trial judge to decide—as he did—that neither imprisonment nor probation should be imposed upon petitioner. There are few doctrines so well settled in our federal criminal law as the doctrine that the punishment imposed, provided it is within the limits set by the statute, rests in the exclusive discretion of the trial judge. *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Rosenberg*, 195

F.2d 583, 604-607 (2d Cir. 1952); *Rosenberg* v. *United States*, 346 U.S. 273, 293 (1953). "The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function." *Hill* v. *Wampler*, 298 U.S. 460, 464 (1936). "At the time of entering a judgment of conviction, the district judge is in the best position to fix the terms of a convict's sentence". *Affronti* v. *United States*, 350 U.S. 79, 83-84, note 13 (1955). The discretionary authority thus vested in the trial judge is vast indeed, giving him the power to make a just disposition in the light of all the circumstances known to him at the time the case comes before him for sentencing. Compare *Williams* v. *New York*, 337 U.S. 241, 247 (1949). And throughout the long course of federal decisions there will be found no serious suggestion that this vast discretionary authority does not include the power to determine, where such a determination is consistent with the statute, that no imprisonment at all is to be imposed. "The responsibility for degree of sentence is wholly within the power of the trial court, provided it does not exceed the declared legal maximum." *Russell* v. *United States*, 119 F.2d 686, 689 (8th Cir. 1941).

Moreover, the statute involved in the present case, 18 U.S.C. § 1702, is not one where the Congress has prescribed some minimum fixed penalty. Thus it differs markedly from statutory provisions such as the five-year minimum imprisonment fixed by Revised Statutes § 5209, which was involved in *Ex Parte United States*, 242 U.S. 27 (1916), where this Court decided that in such a case, there having been no federal probation statute as yet enacted, the trial judge was without power to suspend permanently the five-year minimum imprisonment which the Congress had directed to be served.[7] Similarly, it differs markedly from

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[7] In its opinion this Court was careful to state that the five-year sentence, execution of which the trial judge had suspended after imposing the sentence upon the defendant, was "the shortest term

the five-year minimum imprisonment fixed by 12 U.S.C. §588b(b), which was involved in *Wilson* v. *United States*, 145 F.2d 734 (9th Cir. 1944); or the unalterable twenty-five year imprisonment fixed by the last clause of 18 U.S.C. § 2117, whose predecessor (the former 18 U.S.C. § 320) was involved in *Hunter* v. *United States*, 149 F.2d 710 (6th Cir. 1945). Here, on the contrary, the statute, 18 U.S.C. § 1702, says that the offender "shall be fined not more than $2,000 or imprisoned not more than five years, or both." No minimum whatsoever is fixed, below which the trial judge may not go. The very discretion which the Congress had withheld from the trial judge in the statute which gave rise to *Ex parte United States*, supra, it has conferred upon him here. The present statute does not by its words purport to require that the judge impose any term of imprisonment, or any term of probation in lieu of imprisonment. To apply this Court's language in *Hill* v. *Wampler*, supra, 298 U.S. at 464, a term of imprisonment or probation are penalties imposed under this statute only, "if at all, because the consequence has been prescribed in the imposition of sentence." Accordingly, when the judge determined in

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which under the statute could have been imposed upon him" (242 U.S. at 37), that the punishment was "fixed by law" through a "plain legislative command fixing a specific punishment" (242 U.S. at 42). That this five-year minimum imprisonment fixed by the statute was at the root of the controversy in *Ex parte United States* will also be seen from pages 48-52 of the Brief for the Respondent filed on behalf of the respondent judge (Killits, J.) in that case, as well as from the Reply of the United States to Return of Respondent, pages 19-20, where the Government took to task the respondent judge "who found it consonant with his oath not to resign but rather to refuse to impose the minimum penalty decreed by law, and to name a lesser one, unauthorized save by his own decree"; and again, at page 22, where the Government replied to one of the respondent judge's contentions by arguing: "Really this contention amounts to this: that, because in his opinion minimum penalties are unwise, courts should lend themselves to blocking the enforcement of such laws until Congress shall be moved to repeal them"; and see also pages 25, 27-28 thereof.

open court that no imprisonment and no probation should be imposed upon petitioner, the judge's action was wholly in accordance with law.

Having been wholly in accordance with law, it constituted a final and binding determination by the trial judge to the effect that no imprisonment and no probation should be imposed. The Sixth Amendment's protection against double jeopardy includes protection against a second and more severe sentencing. *Ex parte Lange*, 18 Wall. 163 (1874); *In re Bradley*, 318 U.S. 50 (1943); *United States* v. *Benz*, 282 U.S. 304, 307 (1931). "The federal courts have no power to increase a sentence fixed by a valid judgment." *Rutledge* v. *United States*, 146 F.2d 199, 200 (5th Cir. 1944). Upon determining in open court that no imprisonment and no probation should be imposed, the trial judge had completed his judicial disposition of the case. The matter is governed by what this Court said in *Ex parte Lange*, supra, 18 Wall. at 179:

> "The court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution and by the dearest principles of personal rights, which both of them are supposed to maintain."

By its very nature the initial judgment in the present case was one which was immediately satisfied; the subsequent attempt to amend the judgment "was a nullity". (*In re Bradley*, supra, 318 U.S. at 52).

Nothing contrary to petitioner's position will be found in *Bozza* v. *United States*, 330 U.S. 160, 165-167 (1947). The *Bozza* case involved a statute—then denominated 26 U.S.C. § 2833(a) of the 1940 edition of the United States Code—which, entirely unlike the present statute, specified minimum sentences by providing that the offender "shall, for

every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years." Under that type of statute this Court held that the trial judge might, five hours after originally pronouncing a sentence which was less than the legally prescribed minimum, correct his error by recalling the defendant and counsel into court and resentencing the defendant. *Bozza* has no application in the present case. It is plainly distinguishable on a number of important grounds; among them are the facts that here the statute does not prescribe any minimum punishment; that here the judge's initial action was wholly lawful and within his power; that here the judge's second action was in no sense an effort to correct an earlier mistake or unlawful action, but rather was an attempt to change, in a manner highly unfavorable to petitioner, the effect of the lawful judgment already pronounced; and that here the judge in any event made no effort to bring petitioner back before him immediately [8] but waited nearly two years before doing so.

A word should be added concerning the federal statutory provisions relating to probation, 18 U.S.C. § 3651. Nothing in the Probation Act purports to limit or curtail the authority of the trial judge, under a statute such as the present, to determine that neither imprisonment nor probation should be imposed. Nor does anything in the Probation Act purport to qualify or to redefine the constitutional safeguard against double jeopardy. Indeed, this Court

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[8] Accordingly, it would appear that this Court is not required now to consider the correctness of the few court of appeals decisions which have held that, so long as the defendant has not yet left the courthouse after the initial sentencing, the trial judge may, at least under certain circumstances, still recall the defendant to the courtroom and increase the sentence. *Walton* v. *United States*, 202 F. 2d 18 (D.C. Cir. 1953); *Rowley* v. *Welch*, 114 F. 2d 499 (D.C. Cir. 1940); *DeMaggio* v. *Coxe*, 70 F. 2d 840 (2d Cir. 1934); cf. *Nichols* v. *United States*, 106 Fed. 672 (8th Cir. 1901).

has expressly determined that—even in cases where (unlike the present case) the defendant has been duly placed on probation—the Probation Act by its terms does not authorize that a sentence, which has been imposed before probation and its execution suspended, should be set aside and increased upon revocation of probation. *Roberts* v. *United States,* 320 U.S. 264 (1943). The interpretation given to the Probation Act thus reinforces the conclusion that, in the light of the proceedings which took place when petitioner was present in open court in October 1952, the trial judge had no power in September 1954 to decide that a new punishment should be imposed on petitioner by sending him to prison.

II

THE IMPOSITION OF A PRISON SENTENCE IN SEPTEMBER 1954, SUCH A LONG TIME AFTER THE PLEA OF GUILTY ENTERED IN SEPTEMBER 1952, VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO A SPEEDY TRIAL.

The position taken by the Solicitor General in the Memorandum in Opposition to the Granting of the Petition for Certiorari (page 3) was that, conceding the accuracy of petitioner's factual allegations, nevertheless no judgment had been pronounced when petitioner was before the trial judge in October 1952, the case remained uncompleted, and therefore the district court possessed a continuing jurisdiction which authorized it in September 1954 to impose a prison sentence as the initial judgment in an otherwise uncompleted case. For reasons which are set forth elsewhere in this Brief (pages 6-10, and 21-26), it is petitioner's position that a wholly lawful and definitive judgment was in fact pronounced while he was present in court in October 1952 and that accordingly the case did not continue as an uncompleted case.

But even if, for sake of the argument, we assume with the Solicitor General that in October 1952 the case remained as an uncompleted case in which no final disposition had been made, it by no means follows that the district court would have been authorized to impose a sentence on petitioner as late as September 1954. To the contrary, the wholly unjustifiable lapse of more than two full years between the date of the plea of guilty and the date of the sentence would in any event have deprived the court of its power to impose a prison sentence.

We may take note of the fact that Rule 45(c) of the Federal Rules of Criminal Procedure has modified earlier federal practice so as to provide that "The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding." But this Court has already held that "The Rules, in abolishing the term rule, did not substitute indefiniteness". *United States* v. *Smith*, 331 U.S. 469, 473, note 2 (1947). Rule 32(a) of the Federal Rules of Criminal Procedure expressly makes it mandatory that "Sentence shall be imposed without unreasonable delay." Surely, under the shocking circumstances disclosed by the present record, no contention will now be heard from the Government to the effect that the more than two years which elapsed between September 8, 1952, when petitioner pleaded guilty, and September 21, 1954, when the two-year prison sentence was imposed, could be deemed anything other than an "unreasonable delay."

The violation involved in the present case cuts much deeper, it is submitted, than a violation of Rule 32(a) alone. Because of this inexcusable lapse of a long period of time, the imposition of a prison sentence in September 1954 was also in direct contravention of petitioner's constitutional right to a speedy trial—a basic right guaranteed by the

Sixth Amendment's provision that "the accused shall enjoy the right to a speedy and public trial".[9] Recently this Court has made it clear that, where it appears that the constitutional right to a speedy trial has been seriously infringed, further proceedings in the criminal case shall be brought to a halt. *United States* v. *Provoo*, 350 U.S. 857 (1955), affirming *Petition of Provoo*, 17 F.R.D. 183 (D. Md. 1955). On the undisputed facts which exist in the present case, this principle should have stood as a bar to the imposition of a prison sentence when petitioner was brought before the district court in September 1954.

The sentencing hearing, we submit, is an integral part of the criminal "trial," as the word "trial" is used in the clause of the Sixth Amendment here being invoked. This is a question which, it is true, does not appear to have been previously decided by the Court. But both the purpose of the Speedy Trial Clause and the plain meaning of its text provide full support for the conclusion.

The great purpose of this clause of the Sixth Amendment, to protect citizens against the oppression and the injustice of undue delay, applies to sentencing as well as

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[9] The Solicitor General has placed some reliance on *Miller* v. *Aderhold*, 288 U.S. 206, 211 (1933). But there it appeared, among other things, that the lapse of time between the date of the plea of guilty (December 10, 1930)—which was accompanied by a sentence suspension that this Court assumed, without deciding, to be void—and the date of the imposition of a prison sentence (June 17, 1931) was much shorter, being less than six months. Perhaps for this reason no contention was made in the *Miller* case that the defendant's constitutional right to a speedy trial had been violated, and accordingly this Court was not called upon to consider any such question. Moreover, the *Miller* case arose long before the adoption of the mandatory requirement of Rule 32(a) of the Federal Rules of Criminal Procedure, which established a uniform standard for the federal courts.

to earlier portions of the trial.[10] The textual aspects will be illumined by an example relating to the accompanying constitutional requirement that the trial must be "public": If a federal trial judge were to exclude the public from a sentencing hearing and to impose a sentence upon the defendant in secret session, certainly it would be undeniable that the constitutional right to a "public trial" had been fundamentally violated. Compare *In re Oliver*, 333 U.S. 257, 258-273 (1948).[11] And when the Sixth Amendment guarantees "the right to a speedy and public trial", the word "trial" can hardly be given a more restrictive interpretation in conjunction with one of its modifying adjectives ("speedy") than is required in conjunctive with its other modifying adjective ("public").

Indeed, no reason at all appears which would warrant excluding the sentencing part of a criminal prosecution from the guaranty of a speedy trial, particularly in the light of the principle that this important guaranty in the Sixth Amendment "must be liberally construed". *United States* v. *Henning*, 15 F.2d 760, 761 (9th Cir. 1926). As the Fifth Circuit has indeed recognized in connection with the Sixth Amendment's guaranty of a speedy trial, "It is true that a trial is not complete until sentence is passed, and that the record cannot be held open unreasonably."

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[10] See also the "oft-quoted definition" relied on in *Petition of Provoo*, supra, 17 F.R.D. at 197, to the effect that a speedy trial as provided by the Sixth Amendment means a trial "free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice."

[11] See also the decisions so indicating under requirements imposed by state laws. *Wright* v. *The State*, 103 Ala. 95, 96, 15 So. 506, 507 (1894); *Harris* v. *State*, 46 So.2d 928 (Miss. 1950); *State* v. *Nathans*, 49 S.C. 199, 226, 27 S.E. 52, 62 (1897); *State* v. *Pioneer Press Co.*, 100 Minn. 173, 177, 110 N.W. 867, 869 (1907); *Reed* v. *The State*, 147 Ind. 41, 43-45, 46 N.E. 135, 136 (1897); cf. *Aspden's Appeal*, 24 Pa. 182, 184 (1854).

Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937). While the right to a speedy trial "is necessarily relative" and "depends upon circumstances", *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905), there are no circumstances disclosed by the undisputed facts of the present case which would justify the delay of more than two years which occurred between the plea of guilty in September 1952 and the imposition of a prison sentence in September 1954.

III

THE IMPOSITION OF A PRISON SENTENCE IN SEPTEMBER 1954 DEPRIVED PETITIONER OF HIS LIBERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

On any possible interpretation of the facts disclosed by this record, it is evident that the Government and the district court indulged in a course of conduct not merely irregular but highly arbitrary. As the facts have shown (pages 6-10, above), petitioner left the courtroom on October 3, 1952, with a wholly justified basis for his understanding that no imprisonment and no probation had been imposed for the offense. Nevertheless, the trial judge thereafter, in petitioner's absence and on *ex parte* prompting from the Government, changed his mind and purported to decree that imposition of sentence be suspended and petitioner be placed on probation for a period of three years. As a result of this purported order—the invalidity of which the Solicitor General has conceded—petitioner was unlawfully kept under probation surveillance for a period of nearly two full years and was then arrested at the Government's instigation for violating the conditions of the purported probation. The trial judge, in the September 1954 hearing which disregarded procedural safeguards intended to protect a defendant's rights at such a hearing (see pages 13-16, above), used this alleged violation of the wholly in-

valid probation order as the excuse for imposing upon petitioner a two-year prison sentence for the original offense.

Such an extraordinary course of conduct, for which the district court and the Government together must share the responsibility, can hardly be deemed consistent with the "fundamental fairness essential to the very concept of justice", *Lisenba* v. *California*, 314 U. S. 219, 236 (1941), which constitutes due process of law. The record in the present case discloses a course of "conduct that shocks the conscience", *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Fundamental fairness required that, when petitioner was brought back before the trial judge in September 1954, an order should have been entered to the effect that no term of imprisonment could properly be imposed. Indeed, if proper standards of criminal law administration had been followed by the district court and by the Government, this case could never have been brought back before the trial judge in September 1954. When it was, the judge's duty to release petitioner, rather than to sentence him to the penitentiary, was clear.

IV

EVEN APART FROM CONSTITUTIONAL CONSIDERATIONS, THE IMPOSITION OF A PRISON SENTENCE UPON PETITIONER IN SEPTEMBER 1954 WAS SUCH A SERIOUS DEPARTURE FROM PROPER STANDARDS OF CRIMINAL LAW ADMINISTRATION AS TO REQUIRE CORRECTIVE ACTION.

Points I, II and III of the Argument have set forth the reasons why the imposition of a prison sentence upon petitioner in September 1954 violated petitioner's constitutional rights under the Double Jeopardy Clause of the Fifth Amendment, under the Speedy Trial Clause of the Sixth Amendment, and under the Due Process Clause of the Fifth Amendment. In the course of setting forth these constitutional grounds for reversal, it has also been made clear

that the facts of this record disclose exceptionally grave departures from the proper standards which are applicable throughout the federal courts.

On this record it is apparent that the actions of the federal authorities and the district court—actions which, at best, must be ascribed to extreme carelessness—in this case transformed the administration of the criminal law into an instrument of oppression and injustice against petitioner. The facts have shown the way in which the determination made by the trial judge when petitioner was present in open court was thereafter repudiated by the judge through illegal measures taken in petitioner's absence. They have shown how petitioner was unlawfully kept subject to probation surveillance for nearly two full years and then was brought back before the court in September 1954 because it was alleged he had violated a probation order which, it is now admitted, was not lawful.

In a government of laws it should have been recognized immediately, at the time petitioner was thus brought back before the trial judge in September 1954, that nearly two years of unlawful probation surveillance had been more than enough unlawful punishment, and that in view of the history of this case it would be an exceptional abuse of judicial process for petitioner to be sent to prison. Yet the trial judge nevertheless proceeded to impose a two-year prison sentence; and in the course of doing so, he totally disregarded virtually all the safeguards which the Federal Rules of Criminal Procedure have specified for the protection of a defendant (see pages 13-16, above)—including, if the Solicitor General's position be accepted *arguendo*, the requirement of Rule 32(a) that "Sentence shall be imposed without unreasonable delay" (see page 27, above).

On such a record, it may well be deemed most appropriate that the case should be decided in petitioner's favor without reaching the constitutional questions.

Time and again this Court has emphasized that in criminal cases the federal courts are not to keep the standards down to the bare minimum which would be required by constitutional guaranties. As the Court said in *McNabb* v. *United States*, 318 U. S. 332, 340 (1943):

> ". . . the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

See also *Ballard* v. *United States*, 329 U.S. 187, 193 (1946); *Upshaw* v. *United States*, 335 U.S. 410 (1948); *United States* v. *Carignan*, 342 U.S. 36, 41-43 (1951); *Brown* v. *Allen*, 344 U.S. 443, 476 (1953); *Offutt* v. *United States*, 348 U.S. 11 (1954); *Rea* v. *United States*, 350 U.S. 214, 216-218 (1956). It is not merely the minimum "rock-bottom requirements" of the Constitution which are of concern when a federal criminal case is under review. *Delaney* v. *United States*, 199 F. 2d 107, 113 (1st Cir. 1952).

These principles furnish a proper guide for the disposition of the present case. Moreover, they are fortified by another principle, which found expression in *Frankel* v. *United States*, 131 F.2d 756, 758 (6th Cir. 1942), that "Respect for and confidence in the judicial process would seem to demand that a court keep faith even with the most venial of those subject to its decrees." Or, as this Court itself has said, "justice must satisfy the appearance of justice".

Offutt v. United States, supra, 348 U.S. at 14; *In re Murchison*, 349 U.S. 133, 136 (1955).

Since the trial judge's imposition of a prison sentence upon petitioner in September 1954 involved such far-reaching departures from the proper standards for the administration of the criminal law, effective corrective action by this Court is accordingly called for, even apart from the constitutional grounds which have been argued. The prison sentence unlawfully imposed has been fully served by petitioner; hence the time which petitioner spent improperly confined in a federal penitentiary is now beyond recall. But as a matter of fairness the district court should be directed to enter an order clearly showing that a prison sentence ought not to have been imposed.

CONCLUSION

The essential facts of this case are not in dispute. They disclose that petitioner has been the victim of serious injustice and oppression. Moreover, primarily because of the slowness with which the case has moved through the courts, combined with the failure of both the district court and the court of appeals to recognize the manifest errors committed, petitioner completed the service of this illegally imposed sentence shortly after the writ of certiorari was granted by this Court. On the undisputed facts, and as a matter of simple justice to petitioner, the order of the district court which denied petitioner's motion to vacate should now be reversed by this Court, such reversal to be accompanied by a direction that the district court enter an order which will declare clearly and unequivocally (1) that no sentence should have been imposed on petitioner when he was brought before the district court in September 1954, and

(2) that, upon the entry of such order, the case is to be deemed closed upon the records of the district court.

Respectfully submitted,

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AUGUST 24, 1956.

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No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1956

THOMAS E. POLLARD, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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OCTOBER, 1956.

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REPLY BRIEF FOR PETITIONER

I. IN ADDITION TO RESTING UPON ONE SINGLE PREMISE WHICH IS IN CONFLICT WITH THE RECORD, THE GOVERNMENT'S BRIEF APPEARS TO HAVE CONCEDED A NUMBER OF PETITIONER'S PRINCIPAL POINTS.

Point I of the Government's Brief (pages 13-17) argues that the district court did not dispose of the case when petitioner was before that court on the morning of October 3, 1952. For reasons shown in Petitioner's Brief (and especially pages 6-13 and 21-26 thereof), such an argument

is wholly without foundation and is contradicted by the facts shown in the record.

What does the Government's Brief (see page 15) offer in support of its contention that the case was not disposed of when petitioner was present in court on the morning of October 3, 1952? Primarily, it is a suggestion that we should resort to some sort of "presumption" that what the trial judge intended on that morning was to suspend imposition of sentence and that, because of a "lapse", the judge "failed to express" this. Yet as Petitioner's Brief (pages 21-24) has shown, the particular statute under which petitioner had pleaded guilty fixes no minimum level of punishment at all. In the face of this the Government's Brief does not really challenge the fact that it was within the judge's lawful power to make the very disposition which petitioner contends, and the record shows, the judge actually made on the morning of October 3, 1952—namely that no imprisonment and no probation should be imposed. Indeed, the Government's Brief does not cite a single case which raises any doubt that this was within the judge's lawful power.

If there were any "lapses" in this case—and certainly the record shows that there were—they occurred not during the morning session of the district court on October 3, 1952, but afterwards. On the whole record, which is studded with so many irregularities on the part of the district court and of the United States Attorney's Office,[1] there is plainly no

[1] The Government's Brief (page 18), complaining of the assertion that what occurred was in shocking disregard for petitioner's rights, makes a labored effort to gloss over all these lapses by saying: "We believe that such lapses as occurred in the matter of sentencing were technical and inadvertent". But they can hardly be looked upon as merely "technical", in the sense in which that word is normally used. And even if they were "inadvertent", inadvertence would not save them from being thoroughly discreditable to the administration of the criminal law.

room for indulging in any such strained "presumption" as the Government now suggests. Moreover, despite some slight intimation to the contrary in the Government's Brief (pages 10, 15), there is nothing in Rule 32 or elsewhere in the Federal Rules of Criminal Procedure which coerces a trial judge into imposing the punishment of imprisonment or probation in a case where no minimum punishment of this nature is required by the statute under which the defendant stands convicted.

Because this factually unsupported argument is the single premise on which the Government's entire Brief is built, the Government's Brief becomes even more notable for the things it does not say.

For example, the Government's Brief in no way denies that—if this Court should determine a disposition of the case was made on the morning of October 3, 1952—then the Fifth Amendment's prohibition against Double Jeopardy was violated by what later occurred. Nor does the Government's Brief deny that—if this Court should determine a disposition of the case was made on the morning of October 3, 1952—then the Fifth Amendment's guaranty of due process of law was likewise violated by what later occurred. Nor does the Government's Brief deny that—if this Court should determine a disposition of the case was made on the morning of October 3, 1952—then what later occurred constituted such a serious departure from proper standards of criminal law administration as to require the corrective action sought by petitioner.

Furthermore, the Government's Brief does not deny that, as contended in Point II of Petitioner's Brief, the sentencing hearing is an integral part of a criminal "trial" as the word "trial" is used in the Speedy Trial Clause of the Sixth Amendment.

II. THE GOVERNMENT'S PRINCIPAL CITATIONS ARE WIDE OF THE MARK.

The principal citations in the Government's Brief, and particularly the parade of citations appearing at pages 22 through 25, apparently have likewise been offered on the untenable assumption that the district court did not make a disposition of the case on the morning of October 3, 1952. They would have genuine relevance only if the events which occurred in open court on the morning of October 3, 1952, were to be ignored and the case were to be judged as if those events had never taken place.

Moreover, even if some basis could be found for the Government's untenable assumption, it is still doubtful that the cases cited would be of much help to the Government. For they are cases which did not present contentions under the Speedy Trial Clause of the Sixth Amendment and, in addition, many of them arose before the adoption of the mandatory requirement in Rule 32(a) of the Federal Rules of Criminal Procedure that "Sentence shall be imposed without unreasonable delay." And none of those cases, it should be added, involved the kind of gross violence to the principles of fair play which is apparent from the record presently before this Court.

There is no occasion to disagree with the general principle, which the Government's Brief (page 22) quotes from the opinion in *Bozza v. United States*, 330 U.S. 160, 166-167, that: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." But Petitioner's Brief (pages 24-25) already has shown why *Bozza* is totally inapplicable here. And certainly a second general principle, which has the further advantage of being really applicable to the present case, must be equally true: The Constitution does not contemplate that sentencing should be a game in which a wrong move by the judge, after he has once made a lawful

disposition granting freedom to the accused, can mean the infliction long afterwards of unlawful imprisonment.

CONCLUSION

For the reasons set forth in Petitioner's Brief and the further reasons set forth in this Reply Brief, petitioner is entitled to the relief sought.

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OCTOBER, 1956.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

There were no formal opinions below. The order of the district court denying the motion to vacate judgment and sentence appears at R. 16–27, and its order denying the motion for leave to appeal in forma pauperis at R. 18. The order of the court of appeals denying the motion for leave to appeal in forma pauperis appears at R. 24.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1955 (R. 24, 31). The petition for a writ of certiorari was filed on July 8, 1955, and granted on February 27, 1956 (R. 32). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when petitioner appeared before the district judge for sentencing on October 3, 1952, the court made a final and irrevocable disposition of his case.

2. If the answer to question 1 is "no," whether the district court still retained the power to impose a sentence when petitioner was again brought before the court in September 1954.

STATUTES AND RULES INVOLVED

18 U. S. C. (1952 ed.) 1702, 62 Stat. 778, provides:

Obstruction of correspondence

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U. S. C. (1952 ed.) 3651, 62 Stat. 842, provides:

Suspension of sentence and probation

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that

the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best. * * *

The period of probation * * * shall not exceed five years.

* * * * *

28 U. S. C. (1952 ed.) 1915, 62 Stat. 954, provides:

Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

* * * * *

28 U. S. C. (1952 ed.) 2255, 62 Stat. 967, provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or

is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * * *

Rule 32, Federal Rules of Criminal Procedure, provides:

(a) *Sentence.*

Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) *Judgment.*

A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) *Presentence Investigation.*

* * * * *

(d) *Withdrawal of Plea of Guilty.*

* * * * *

(e) *Probation.*

After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 43, Federal Rules of Criminal Procedure, provides:

Presence of the Defendant

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * *

STATEMENT

On September 8, 1952, in the United States District Court for the District of Minnesota, petitioner in open court waived prosecution by indictment and consented to an information against him. The charge was the unlawful taking and embezzlement of a United States Treasury check, in the amount of $192.29, in violation of 18 U. S. C. 1702 (*supra*, p. 2) (R. 2, 3-4, 30). Upon petitioner's plea of guilty, imposition of sentence was deferred by Judge Joyce for pre-sentence investigation (R. 30).

On October 3, 1952, petitioner appeared before the court for sentencing, having been brought there on a writ of habeas corpus ad prosequendum from prison at Stillwater, Minnesota, where he was serving a state-imposed sentence (R. 4, 30). Judge Joyce stated that the probation report indicated that petitioner had taken a very active interest in the Alcoholics Anonymous organization in prison, and petitioner told the court that he contemplated continuation of this interest upon his release. In answer to a query, petitioner also told the court that he would have an opportunity of going before the parole board the following month. After perusing the probation report, the judge stated that he was impressed by the fact that petitioner, who had stolen the check after a two-week drinking spree, had later revealed what he had done to an officer of Alcoholics Anonymous and to the F. B. I. without any effort to minimize the offense. The court advised petitioner that, upon his release, he should join Alcoholics Anonymous immediately and carry out faithfully every ob-

ligation imposed upon him so that he could win his fight against alcoholism (R. 5). This colloquy then occurred (R. 5–6):

> The COURT. If you don't do those things, and if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.
>
> So, good luck to you and I hope the parole board will give you an opportunity.
>
> That is all.
>
> [PETITIONER]. Thank you very much, sir.

At that point, the hearing terminated and the court turned to other business.

Later that day (October 3, 1952), after other criminal matters had been presented to the court, the government attorney reverted to petitioner's case, stating that he was not clear as to what disposition had been made. The court announced that there was to be probation for three years, to commence after expiration of the state sentence (R. 6). A judgment and order of probation (R. 6–8) was then entered (R. 30). It recites, *inter alia,* that petitioner had been advised of and had waived his right to counsel; that he had been convicted upon his plea of guilty; that the imposition of sentence is suspended; and that petitioner is placed on probation for a period of three years, to commence immediately after his release on the state charge from Stillwater Penitentiary.

Petitioner was released from Stillwater on November 26, 1952, and placed under the supervision of the United States probation officer (R. 28). Upon

report of the probation officer that petitioner had violated the terms of his probation, a bench warrant was issued and petitioner was taken into custody on September 15, 1954 (R. 8-10, 30). The following colloquy occurred in a hearing held on September 21, 1954 (R. 11):

> Mr. EVARTS [U. S. Attorney]. * * * [Petitioner] * * * is before the Court at this time and is not represented by counsel, is that correct?
>
> [PETITIONER]. That's correct.
>
> Mr. EVARTS. You understand you have the right to be represented by counsel?
>
> [PETITIONER]. Yes, sir, I do.
>
> Mr. EVARTS. Is it your desire to waive that right?
>
> [PETITIONER]. Yes, sir. It is.
>
> The COURT. What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.
>
> Mr. EVARTS. Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an Order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.
>
> The COURT. All right.

A formal judgment and commitment was then entered, reciting the sentence of imprisonment for two years and ordering that the judgment and order of

probation entered on October 3, 1952, be set aside (R. 12, 31).

On February 11, 1955, petitioner filed a motion to vacate sentence under 28 U. S. C. 2255, asking for his immediate release. The ground of the motion was that, since he was not present on October 3, 1952, when the court made its order subjecting him to probation for three years, his sentence of imprisonment for two years for what he calls "probation violation" was illegal and unconstitutional (R. 13–15, 31).[1] In denying this motion on March 23, 1955, the court stated (R. 16–17): "[Petitioner] was initially sentenced upon September 21, 1954, and the files and records in the case conclusively show that said judgment was within the jurisdiction of the court and the sentence imposed was valid and in accordance with law." On April 4, 1955, petitioner filed a notice of appeal, supported by an affidavit and a motion for leave to proceed in forma pauperis in which he alleged that he believed that he had a meritorious cause of action and that his appeal was taken in good faith (R. 17–18, 31). On April 18, 1955, the district court entered an order denying this motion "in all respects" (R. 18, 31).

On May 16, 1955, petitioner filed a motion for leave to appeal in forma pauperis in the Court of Appeals for the Eighth Circuit, and a supporting affidavit stating that he believed he was entitled to redress and that the appeal was taken in good faith (R. 19–23). In its order denying this motion on June 23, 1955, the court of appeals, after observing that the

[1] The full term of the sentence expired in September 1956.

district judge had already denied leave to appeal in forma pauperis, stated: "The Court has examined the original files of the United States District Court and after due consideration the motion for appeal in forma pauperis is denied" (R. 24, 31).

SUMMARY OF ARGUMENT

I

Petitioner erroneously assumes that the district judge made a final and irrevocable disposition of his case when he appeared for sentencing on the morning of October 3, 1952. The record of that hearing clearly shows that the judge decided against imposition of a presently effective sentence of confinement. It does not show additionally, as petitioner would have it, an intention not to suspend sentence. The judge said nothing which would provide even the slightest support for the conclusion that the court intended to permit a withdrawal of the prior plea of guilty, to dismiss the information, to acquit petitioner, or to take any other action inconsistent with the plain fact, accepted by all present, that petitioner stood convicted.

It appears to be petitioner's interpretation of the record of the above hearing that the court proposed to convict petitioner and to do no more than advise and warn him. But conviction without sentence or suspension of imposition of sentence is unknown to federal practice and unauthorized by the federal rules. The plausible interpretation, all factors considered, is that the judge indavertently failed to de-

clare expressly his intention to suspend imposition of sentence.

In any event, this interpretation is compelled by what promptly followed. A scant few hours later, the court unequivocally expressed its intention to place petitioner on probation. We concede that the order of probation which was thereupon entered was defective because the court failed to call petitioner back and to state to him in open court the facts recited in the court's written judgment and order. The net result was that the only formal disposition of the case which the court purported to make was invalid and that the case remained incomplete.

II

The remaining question is whether the trial court could complete the case by a sentence imposed almost two years later. It is firmly established by a long line of decisions that a trial court does not lose the power to impose a valid sentence because the sentence initially ordered was invalid or because of an initial inadvertent failure to impose any sentence. See especially *Miller* v. *Aderhold*, 288 U. S. 206. Indeed, one who has actually been confined under an illegal sentence and has successfully filed a petition for a writ of habeas corpus is not entitled to absolute discharge; his right is to have a correct judgment entered on the resentencing. *In re Bonner*, 151 U. S. 242. It is likewise settled that there is no fixed time limitation upon the power to correct a defective sentence, as evidenced by the cases which have held that

such power subsisted notwithstanding the end of a term of court. *E. g., Miller* v. *Aderhold, supra.*

There is nothing in this case to warrant an exception. Petitioner's suggestion that he was seriously prejudiced because he was not informed on October 3, 1952, that he was being placed on probation is insubstantial. Under the terms of the probation order which the court entered, petitioner was to go on probation for three years, such period to commence on petitioner's release from the state prison where he was then confined under an independent sentence for another offense. It appears from petitioner's own pleadings that he was released from state prison in November 1952, and that he knew at that time that there was an outstanding federal order placing him on probation. Thereafter, he was in regular contact with the federal probation officer. By his own statements, it appears that he consciously elected not to present an immediate challenge to the probation order, though he questioned its validity. There is little equity in the notion that petitioner could save the point that the original probation order was defective until such time as he was apprehended for violating it and thereupon claim that lapse of time estopped the court from entering a valid sentence for the offense of which he stood duly convicted.

ARGUMENT

INTRODUCTION

We do not contest the jurisdiction of the Court to consider the merits of this cause even though 28 U. S. C. 1915 (a) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies

in writing that it is not taken in good faith." While the district court denied "in all respects" a motion for leave to proceed in forma pauperis (a motion supported by petitioner's affidavit that his appeal was taken in good faith), it is doubtful that this amounts to a certification in writing that the appeal was not taken in good faith within the meaning of the statute.

Moreover, while such a certificate carries great weight, it is not necessarily conclusive. See *Wells* v. *United States*, 318 U. S. 257, 259–260; *Higgins* v. *Binns*, 204 F. 2d 327 (C. A. 9). By applying for leave to appeal in the court of appeals, petitioner, in effect, challenged the trial court's ruling as without warrant. And the court of appeals reviewed the merits in deciding to follow that ruling. A review by this Court of the denial of leave to appeal will also involve an examination of the merits of the underlying cause. Since the issues are narrow and since the sentence has already run, we suggest that little purpose would be served by remanding the case if the Court decides that leave to proceed in forma pauperis should have been granted. Our position is that petitioner's motion for vacation of his sentence was properly denied on the merits.

I

THE DISTRICT COURT DID NOT DISPOSE OF THE CASE ON OCTOBER 3, 1952

A case cannot be deemed at an end until some formal disposition, or at least some unequivocal declaration of the intended disposition, is made by the court.

"In a criminal case, final judgment means sentence * * *." *Miller* v. *Aderhold,* 288 U. S. 206, 210.

When petitioner appeared before the district judge for sentencing on the morning of October 3, 1952—an appearance which followed his plea of guilty and a pre-sentencing investigation—the expected disposition was a sentence or the suspension of imposition of sentence. There was no question before the court, indeed no suggestion of a question, as to the validity of the prior proceedings. Petitioner, a man already serving a sentence imposed by a state court, stood before the bar guilty of a serious offense, as acknowledged by his own prior plea. Thereupon, the district judge and petitioner engaged in a discussion of petitioner's problems (which appeared to have their root in drinking) and his history. The judge, by his words, manifested a decision to permit petitioner to return to society upon the expiration of his state sentence. That is clear. But the court did not purport to permit a withdrawal of the plea of guilty, to dismiss the information, to acquit the petitioner, or to take any other step inconsistent with the plain fact, accepted by all present, that petitioner stood convicted. That is equally clear. The upshot of the morning hearing was that petitioner was removed from the courtroom after hearing the court's advice and admonitions.

Petitioner declares that it is "clear" that the trial judge determined that neither imprisonment nor probation should be imposed (Br. 21). This statement is half-right. The intention to give petitioner a chance to obtain parole from the state authorities and to go forth and mend his ways was expressed. Noth-

ing was stated, however, one way or the other, as to suspension of imposition of sentence or as to probation.

The presumption, we submit, is that suspension of imposition of sentence was intended. The notion that a court would make a determination of guilt, obtain a pre-sentencing report, and order an appearance of the defendant for sentencing, yet purposefully fail to impose sentence or to suspend imposition of sentence, far from being the only rational interpretation as petitioner suggests, is implausible. So far as we are aware, there is no such practice known to the federal courts, and petitioner does not cite a single case in which it has been done. Rule 32 (*supra*, pp. 4, 5) plainly contemplates only two possibilities so far as the convicted defendant is concerned: the imposition of sentence (Rule 32 (a)) or probation (Rule 32 (e)).[2]

The plausible interpretation of the record made at the first October 3d hearing is that the court, as a result of oversight, failed to express a decision to suspend imposition of sentence. That a judge with a busy calendar before him might have such a lapse scarcely strains the imagination.

But one is not left to inference or speculation. The district judge stated his intention unequivocally, later the very same day, when his attention was drawn to the inconclusiveness of the sentencing hearing. We

[2] As indicated in Section 3651 of the Criminal Code (*supra*, p. 3), the defendant may be placed on probation when *execution* of the sentence is suspended or when *imposition* of sentence is suspended.

quote the colloquy between the government attorney and Judge Joyce (R. 6):

> Mr. HACHEY. Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary period after his release from Stillwater, or any type of sentencing?
>
> The COURT. It is to commence at the expiration of sentencing at Stillwater.
>
> Mr. HACHEY. Probation to commence after expiration of his sentencing at Stillwater—for how long?
>
> The COURT. Three years.

We concede that the ensuing probation order was invalid because petitioner was not present when the decision to place him on probation was first concretely stated (see Rule 43, *supra*, p. 5).[3] But we submit that the court's statements and the order which it entered on the afternoon of October 3 (R. 6–8) show conclusively that the court had not intended, on the morning of October 3, to take or imply any action inconsistent with placing petitioner on probation.[4] To accept petitioner's position on this branch of the case, one must suppose, first, that the district judge intentionally undertook a quite novel course of action (a supposition not compelled by the morning hearing and far less persuasive than the supposition that the judge inadvertently failed to make a full disposition

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[3] Cf. *Lewis* v. *United States*, 146 U. S. 370, 372; *Cook* v. *United States*, 171 F. 2d 567, 569 (C. A. 1), certiorari denied, 336 U. S. 926; *Anderson* v. *Denver*, 265 Fed. 3 (C. A. 8).

[4] This, of course, is further confirmed by the court's action in 1954, imposing the sentence "in the first instance" (R. 11).

of the case) and, second, that, without any intervening circumstance or explanation, he undertook, a scant few hours later, to undo that which he had just purposefully done.

We submit that no effective disposition of the entire case was made on the morning of October 3, 1952, and that the circumstances admit of only one reasonable conclusion—that the district judge inadvertently failed to pronounce, at the morning hearing, the sentence of probation which he undertook to prescribe in the afternoon. Since the defendant was not present on the second occasion, the case still remained incomplete.

II

THE SENTENCE IMPOSED IN SEPTEMBER 1954 WAS A VALID SENTENCE

We have argued above that the district court did not effectively dispose of the case in October 1952 and that, accordingly, its jurisdiction was not exhausted.[5] There remains the question whether, thereafter, there was such an unreasonable, inexcusable, and prejudicial delay that this Court, in the exercise of its supervisory jurisdiction, should hold that the district court lost the power to impose a sentence.[6]

[5] Petitioner's argument of double jeopardy fails, of course, if one rejects his premise that an irrevocable disposition of the case was made on the morning of October 3, 1952.

[6] Petitioner makes arguments both in terms of the Court's supervisory powers and in constitutional terms (relying on the due process clause and the right to speedy trial). But, as his brief implicitly recognizes, the crucial question from either standpoint is whether there was such gross prejudice to petitioner that the district court's normal power to impose sentence for crime must be deemed lost or forfeit.

That, of course, depends upon a full evaluation of the circumstances.

Petitioner repeatedly suggests that the district judge and the government's trial attorney acted with shocking disregard for petitioner's rights. We believe that such lapses as occurred in the matter of sentencing were technical and inadvertent. Whatever else may be said and whatever result this Court may reach, it should be recognized that what transpired was certainly not marked by harshness or by hostility to the defendant, and that, indeed, this case would not be here but for the fact that the district judge was disposed to show considerable leniency to a man who had a prison record and who was unquestionably guilty of a serious offense. It was in order to give petitioner another chance that the judge decided, on October 3, 1952, that he would refrain from imposing confinement and that he would leave the way clear for petitioner to seek parole from the state authorities. That is the starting point in this case, and it is not one to be ignored.

A few hours after the sentencing hearing, the government attorney, checking over his list of cases, quite properly advised the judge that he was not clear concerning the court's disposition of petitioner's case. At this point, the judge, apparently believing that he was only making explicit what he thought to be implicit in his earlier remarks, declared that petitioner was to be on probation after his release from state prison. Admittedly, the correct procedure would have been to require petitioner's return to the courtroom to hear the express terms of the proba-

tion. But, again, let it be recognized that if the court had said in the first instance what it apparently meant to say, but neglected to express, petitioner hardly could have complained. On the contrary, a defendant in petitioner's position could not have failed to regard a sentence of probation as extremely generous.

Petitioner suggests that he was seriously misled. We point out that the court's "Judgment and Order of Probation," dated October 3, 1952, directed the probation officer to deliver a copy of said judgment and order to the petitioner (R. 8). While petitioner's brief states (p. 12) that "[t]here is no showing that a copy of this order was ever delivered to petitioner," petitioner's pleadings affirmatively disclose that he was notified in November 1952, when he was released from state prison, that the district judge had placed him on three years' probation (R. 14). Petitioner did not go back to the district judge at that time to challenge the probation order or to seek clarification. This is not a case, therefore, in which a man, after a long interval, learns that there is an outstanding order—one affecting his freedom—of which he was never informed. During the entire time that he was out of prison, petitioner knew that there was an outstanding probation order directed to him. He was also in contact with the probation officer. According to his pleading, he doubted the validity of the order but elected not to challenge it (R. 14). In these circumstances, we do not believe that he can fairly claim that he was seriously prejudiced. Certainly, petitioner was not entitled to save the point that the

original probation order was defective and then to assert, when apprehended for its violation, that lapse of time estopped the court from entering a valid sentence.

In the absence of unusual and seriously prejudicial circumstances, there can be no doubt that a court's power to impose a valid sentence is not lost merely because it has ordered an invalid sentence, or has inadvertently failed to impose any sentence in the first instance.

The effect of a void sentence upon the court's power to act at a subsequent time was fully considered in *Miller* v. *Aderhold,* 288 U. S. 206, decided by a unanimous court. The accused in that case had entered a plea of guilty on December 10, 1930. Sentence was thereupon suspended and he was discharged from the custody of the marshal. On June 17, 1931, at another term of court, he was sentenced by another judge to four years' imprisonment. Attacking this sentence, the prisoner contended (1) that the original sentence constituted a permanent suspension of sentence, which made it invalid, and (2) that the trial court was without power to impose another sentence after expiration of the term of court at which the conviction took place. Assuming, *arguendo,* the correctness of the first contention, this Court disagreed with the second and held that the power to impose a valid sentence was not lost, even though there had been initial error. It stated (pp. 210–212):

> In a criminal case final judgment means sentence; and a void order purporting permanently to suspend sentence is neither a final nor a

valid judgment. * * * If the suspension be for a fixed time, the case undoubtedly remains on the docket of the court until disposed of by final judgment. There is no good reason, in our opinion, why a different rule should obtain where the order of suspension, though expressly made permanent, is void. Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence. * * *

The order here under review being ineffectual to confer immunity from punishment, the conclusion that such immunity existed must rest upon the bare fact that, without any saving provision, the term at which the accused was convicted but not sentenced had passed. But that foundation for the conclusion at once vanishes in the face of the rule that where judgment has not been pronounced upon a verdict during the term at which it was rendered, the cause continues on the docket and necessarily passes over to a succeeding term for final judgment or other appropriate action. *Walker* v. *Moser*, 117 Fed. 230, 232. We conclude, in accordance with what we regard as the better view, that in a criminal case, where verdict has been duly returned, the jurisdiction of the trial court, under circumstances such as are here disclosed, is not exhausted until sentence is pronounced, either at the same or a succeeding term.'

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[1] In *Hammers* v. *United States*, 279 Fed. 265, 266 (C. A. 5), cited in *Miller* v. *Aderhold*, *supra*, 288 U. S. at 211, the court of appeals had held:

"The imposition of a void sentence is not an obstacle to the assumption by the court which imposed it of jurisdiction of the

The same essential principle was involved in *Bozza* v. *United States*, 330 U. S. 160, although there the interval between the initial imposition of the invalid sentence and the subsequent entry of a valid one was far briefer (five hours). Reiterating its rejection of the "doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogther, because the court committed an error in passing the sentence" (p. 166), the Court pointedly declared (pp. 166–167): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."[8] For other cases involving application of the principle stated in the *Miller* and *Bozza* cases, see *McDonald* v. *Moinet*, 139 F. 2d 939, 941 (C. A. 6), certiorari denied, 322 U. S. 730; *Ellerbrake* v. *United States*, 134 F. 2d 683, 684–685 (C. A. 7), certiorari denied, 319 U. S. 775; *Ellerbrake* v. *King*, 116 F. 2d 168, 170 (C. A. 8); *Pratt* v. *United States*, 102 F. 2d 275, 277 (C. A. D. C.); *Zerbst* v. *Nahas*, 67 F. 2d 742 (C. A. 10); *Rosenwinkel* v. *Hall*, 61 F. 2d 724 (C. A. 7); *Ex Parte De Angelo*, 50 F. 2d 847, 848 (C. A. 6); *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. A. 2), certiorari denied, 262 U. S. 751; *United States* v. *Wilfong*, 95 F. Supp. 897, 899 (W. D. Mich.).

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convict, in order that a legal sentence may be imposed. Where there is a conviction, accompanied by a void sentence, the court's jurisdiction of the case for the purpose of imposing a lawful sentence is not lost by the expiration of the term at which the void sentence was imposed. The case is to be regarded as pending until it is finally disposed of by the imposition of a lawful sentence."

[8] In *Bozza*, as in *Miller*, there was no dissent on the issue under discussion.

What holds true of an initial invalid sentence is likewise true (and for the same reasons) of an initial failure to impose sentence resulting from inadvertence or oversight: the case remains open and sentence may be imposed at a later date. As stated in *United States* v. *May*, 9 D. C. 512, 513, "* * * if the judge, by accident, mistake, or design, should fail to pass sentence during the term of the court at which the verdict was found, he may do so at a subsequent term, and so may any judge holding the same court."* To similar effect, see *Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. A. 8); *Davis* v. *State*, 192 Ga. 648, 649; *Davis* v. *Commonwealth*, 230 Ky. 589; *Flint* v. *Commonwealth*, 114 Va. 820, 823; *State* v. *Graham*, 225 N. C. 217, 219.

It may be argued that petitioner suffered a disability as a result of the defect in the October 1952 proceedings, *i. e.*, he made himself amenable, beginning in November 1952, to the supervision of a probation officer who in fact lacked authority over him. But since petitioner consciously chose not to contest the probation order—had he done so, unquestionably the defect would have been cured at once and the entire situation clarified—there is little equity in the suggestion that the court was without power to correct the defect later. The circumstance that for a period of almost two years petitioner undertook to comply with an invalid probation order was a proper consideration for the court in deciding what sentence to im-

**Miller* v. *Aderhold*, *supra*, expresses approval of this rule (see the quotation from the opinion appearing at pp. 20–21, supra), although the case involved an invalid sentence rather than an initial failure to pronounce sentence.

pose (we note parenthetically that the sentence actually imposed was well below the maximum—two as opposed to five years—although petitioner was not a first offender); it does not go to the court's power.[10]

Indeed, the cases make it clear that a person actually *confined* under an illegal sentence is not entitled, if he successfully files a petition for a writ of habeas corpus or a petition to vacate sentence, to an absolute discharge; his right is to have a correct judgment entered on the resentencing. *In re Bonner*, 151 U. S. 242, 262; *Hammers* v. *United States*, *supra*, 279 Fed. at 266 (C. A. 5); *Bryant* v. *United States*, *supra*, 214 Fed. at 53; *Wilson* v. *Bell*, 137 F. 2d 716, 719–721 (C. A. 6); *McDonald* v. *Moinet*, *supra*, 139 F. 2d at 941; *Crowe* v. *United States*, 200 F. 2d 526, 529 (C. A. 6); *Biddle* v. *Shirley*, 16 F. 2d 566 (C. A. 8); *Cahill* v. *Biddle*, 13 F. 2d 827, 829 (C. A. 8); and see *Dowd* v. *Cook*, 340 U. S. 206, 209–210; *Mahler* v. *Eby*, 264 U. S. 32, 46. Nor may a prisoner claim double jeopardy under a habeas corpus release by reason of a void sentence; he may be arrested and prosecuted again. *Mitchell* v. *Youell*, 130 F. 2d 880, 882 (C. A. 4); *Bayless* v. *United States*, 147 F. 2d 169, 170 (C. A. 8), modified on other grounds, 150 F. 2d 236; *Robinson* v. *United States*, 144 F. 2d 392, 397 (C. A. 6),

[10] We point out that the court's original order of October 3, 1952, purported to place petitioner on probation for three years and that federal law permits probation for as long as five years (18 U. S. C. 3651, *supra*, pp. 2–3). If the effective imposition of sentence in this case had not taken place within a lesser period than these, far different questions would be presented. In saying that the court here plainly acted within its powers, we do not wish to be understood as saying that a court's power to correct sentence knows no time limitations.

affirmed on other grounds, 324 U. S. 282; *Bryant* v. *United States, supra,* 214 Fed. at 53. *A fortiori,* there was no bar to imposition of sentence in the instant case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
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Attorneys.

SEPTEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 38

THOMAS E. POLLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

At the oral argument Mr. Justice Clark inquired of counsel for the Government concerning the "other criminal matters" which were presented to Judge Joyce on the morning of October 3, 1952, during the interval between (a) petitioner's departure from the courtroom, and (b) Judge Joyce's statement, answering the query of the Assistant United States Attorney as to the disposition of the Pollard case, that he was to be on probation for three years (R. 6).

In further response to Mr. Justice Clark's inquiry, we are lodging with the Clerk a certified transcript of all the proceedings before Judge Joyce that morning, and it is reprinted in the Appendix hereto.[1] The transcript shows:

[1] A copy of this transcript was made available to, and was examined by, counsel for petitioner prior to the oral argument of this case on December 3, 1956.

410376—56——1

1. The district court's session on the morning of October 3 commenced at 10 a. m. and concluded at 10:30 a. m. The Pollard case was taken up as the second matter on the calendar, and again at the close of the session. The interval between Judge Joyce's original disposition of the case and his later statement that Pollard was to be placed on probation was apparently no more than 20 or 25 minutes. The intervening matters principally involved sentences and arraignments.

2. Judge Joyce remained on the bench throughout the entire half-hour session. There were apparently no discussions between Judge Joyce and others concerning the Pollard case, apart from those appearing in the printed record (R. 4–6).

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1956.

APPENDIX

In the United States District Court, District of Minnesota, Fourth Division

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS E. POLLARD, ET AL., DEFENDANT

The above matters came on for disposition before the Honorable Matthew M. Joyce, judge of the above court, in the United States Court House, Minneapolis, Minnesota, October 3, 1952; William Essling, Ronald E. Hachey, and Richard Johnson, Assistant United States District Attorneys.

OCTOBER 3, 1952—10:00 a. m.

Mr. ESSLING. If the Court please, Mr. Hachey has the first matter.

Mr. HACHEY. The first matter on this morning's calendar is the matter of *United States* vs. *Leroy Wayne Potter*. This young man is a juvenile and appeared before your Honor on May 19th of this year, charged under the Juvenile Delinquency Act of the interstate transportation of a stolen motor vehicle. The facts indicate that in August of 1952 he stole an automobile in Milwaukee and transported it to Omaha, Nebraska, where he was arrested.

The COURT. How old is he now?

Mr. HACHEY. Are you 18?

The DEFENDANT. Yes.

The COURT. Have you any explanation as to why you stole these cars?

The DEFENDANT. No.

The COURT. None at all?

The DEFENDANT. No.

The COURT. Do you have a feeling of regret about it, are you sorry you did it or would you do it again if you had a chance?

The DEFENDANT. I wouldn't do it again.

The COURT. You wouldn't?

The DEFENDANT. No.

The COURT. Why?

The DEFENDANT. I see the mistake now.

The COURT. Do you know that you did $626 worth of damage on that first car, the Oldsmobile?

The DEFENDANT. Yes.

The COURT. You do. You have stolen three cars—Oldsmobile, Mercury, and I forgot what the last one was—what was it?

The DEFENDANT. Another Oldsmobile.

The COURT. Oh, another Oldsmobile. Do you like Oldsmobiles?

The DEFENDANT. Sure.

The COURT. You were happy at home, weren't you? Your father and mother were good to you?

The DEFENDANT. Sure.

The COURT. Didn't you have an idea that going out and stealing these cars was going to make them very unhappy and miserable and cause them a great deal of sorrow?

The DEFENDANT. Yes.

The COURT. Did you care about that?

The DEFENDANT. I didn't think I would at the time.

The COURT. How far along in school did you get?

The DEFENDANT. Got one year to go yet.

The COURT. Did you get good marks in school?

The DEFENDANT. No.

The COURT. Wasn't there anything you did well in?

The DEFENDANT. Oh, some subjects I did fairly good in.

The COURT. Did you like to go to school at all?

The DEFENDANT. Yes; I'd like to go back to school now.

The COURT. Did you go for athletics at all?

The DEFENDANT. Not in school, but outside of school.

The COURT. There is nothing for me to do in view of your age and the circumstances of this case except to remand you to the custody of the Attorney General of the United States or his duly authorized representative for the period of your minority. That will be the order.

Mr. HACHEY. That's all.

The next matter is United States versus Thomas E. Pollard. This matter is here for sentencing, your Honor. At this time the Government moves for sentencing of the defendant.

The COURT. You are presently in Stillwater?

The DEFENDANT. Yes, sir.

The COURT. How long have you been there?

The DEFENDANT. Thirteen months, sir.

The COURT. Have you any craving or desire for a drink now?

The DEFENDANT. None whatsoever.

The COURT. You are about 35?

The DEFENDANT. Yes, sir.

The COURT. I suppose that you are an age where you realize now the futility, don't you?

The DEFENDANT. Yes; very much so, your Honor.

The COURT. The report shows that you have taken a very active interest in the AA organization in the prison.

The DEFENDANT. I have, sir.

The COURT. And that you contemplate doing that when you get out?

The DEFENDANT. I do.

The COURT. The report also shows that you won't get out until 1953 sometime.

The DEFENDANT. December 1953 is my discharge date.

The COURT. When do you have an opportunity for going before the parole?

The DEFENDANT. Next month—I was given three months in August, a three-month waiting term, period, in August.

The COURT. There was one thing you did, as shown in this probation report, which appealed to me. I realize that you had been on a protracted spree when you stole this government check, but when you sobered up long enough to understand what you had done, you went to one of the officers of the Alcoholics Anonymous and told him what you had done and you sought to make amends insofar as you then could do. You told the FBI the circumstances, without any effort on your part to minimize the offense; in fact you had been drinking for some two weeks continually.

You are now 35 years of age.

The DEFENDANT. Yes, sir.

The COURT. You ought to know the misery and the grief and the sorrow and the horror of what continued drinking on your part will bring to you.

If I might suggest to you, and I am giving you gratuitous advice but it is the result of observation and experience—it is my view that when you get out you should immediately join the Alcoholics Anonymous organization—not wait a week or two weeks or three weeks—but have that your first mission after you contact your family, and do what they tell you to do and do it immediately and do it diligently and

faithfully, carry out every obligation that they impose upon you. With your background and with your ability I think that you can win this fight.

If you don't do those things, and if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.

So, good luck to you and I hope the parole board will give you an opportunity. That is all.

The DEFENDANT. Thank you very much, sir.

Mr. ESSLING. If the Court please, the next matter on the calendar appears to be the United States versus Edward Arthur McCormick. This matter is before your Honor for sentence. At this time the government moves for sentence. I might call to the Court's attention that in this matter the attorneys for the Standard Act Indemnity Company have prepared a petition which they desire to present your Honor this morning concerning some $3,096 that the FBI took from the possession of this defendant and I believe the defendant has acknowledged that that money came from the bank, and the petition is going to ask the Court to refund that money, allow the FBI to return that money to the Standard Act Company, and I mention this because perhaps the Court may want to interrogate the defendant.

The COURT. Do you think I should see this before I impose sentence?

Mr. ESSLING. I haven't seen the petition.

The COURT. Who is this attorney?

Mr. ESSLING. Mr. H. Carson.

The COURT. Is he here in court?

Mr. ESSLING. No; he advised me he was going to be here, but he isn't here.

The COURT. He should be here if he had anything to present to the Court this morning in connection with this case.

You came from a good home.

The DEFENDANT. That's right, sir.

The COURT. And a fine family, and by your conduct and action you have so shamed and humiliated your family as to cause them to leave Mankato where they had lived for many years and move up to northern Minnesota to get away from everything. This report shows that you have no regard for, or consideration of, the rights of others, and that every day when you are free you are a menace and threat to society. The report also shows that you are bad, thoroughly bad, and as the probation officer has stated, "if there are any mitigating circumstances in this case we have been unable to find them"—and I cannot find any either. Is there anything that you want to say in your own behalf——

The DEFENDANT. No, sir.

The COURT (continuing). Before the sentence of the Court is imposed upon you?

The DEFENDANT. No.

The COURT. Well, in Missouri you had received two first degree robbery sentences of seven years each and they made a mistake of paroling you, turning you loose on society again. There are parole boards that do those things with the results often that we have here this morning in your case. You perpetrated two holdups here in Minneapolis which you have confessed and in which you were not caught—you got money on both of them. When you robbed this bank at Waterville you caused the people who were there to lie on the floor at the point of a loaded gun. You caused the bank employees to enter the vault and slammed the door—for all that you knew or

cared, they might have suffocated, it wouldn't have bothered you a bit. What do you have on the esthetic side of your nature? The report shows you paid $350.00 for dancing lessons at the Astaire Dancing Studio here in Minneapolis. Part of that course was not completed; it will be completed either in Alcatraz or Leavenworth.

It is the judgment of this Court that you be committed to the custody of the Attorney General of the United States for incarceration in an institution for a period of 15 years, a fine of $5,000.

Mr. JOHNSON. Your Honor, the next matter is that of Domingo Ortiz-Martinez. Your Honor, in that matter the Court I believe would welcome the assistance of an interpreter. We have Mr. Watland here.

The COURT. Is that on my calendar?

Mr. JOHNSON. Yes, your Honor, the fourth matter on the calendar—today's calendar; it's not on your regular criminal calendar, sir.

(Whereupon, Mr. Charles D. Watland was duly sworn in as interpreter for defendant Martinez.)

Mr. JOHNSON. Your Honor, this is a Second Division matter, and I have here a petition for transfer signed by the defendant, witnessed by his attorney.

The COURT. Does he understand what this proceeding is about?

Mr. WATLAND. He says he doesn't.

The COURT. He doesn't. Well, go ahead and tell him.

Mr. JOHNSON. Mr. Nichols explained this petition to you before he signed it?

The DEFENDANT (by the interpreter). Yes.

Mr. JOHNSON. And you want your case to be heard this morning before this judge?

The DEFENDANT. Yes.

The COURT. Is he Spanish?

Mr. JOHNSON. Mexican.

Mr. NICHOLS. He is an American-born citizen; he lives in Eagle Pass, Texas.

Possibly the record should show Floyd D. Nichols appears as his counsel.

The COURT. Where were you born?

The DEFENDANT. Lorado, Texas.

The COURT. How much English did you ever learn?

The DEFENDANT. Very little.

The COURT. Did you ever go to an American school?

The DEFENDANT. No.

The COURT. Did you go to a Spanish school?

The DEFENDANT. No.

The COURT. You were born and raised in the state of Texas?

The DEFENDANT. Yes.

The COURT. He spent all of his life in that area?

The DEFENDANT. In different parts of Texas.

The COURT. Well, I understand, I know now what you said.

Mr. JOHNSON. At this time the government moves the arraignment of the defendant, your Honor.

The COURT. He may be arraigned. Explain to him now he is going to be arraigned, or have you done so?

Mr. WATLAND. No.

(The Indictment was then read by the Clerk of Court.)

The COURT. Now, I suggest that you hand that to the interpreter and let him explain it to him.

(The interpreter does so.)

The CLERK. What is your plea, guilty or not guilty?

The DEFENDANT. I am guilty in that I brought them here, but I did not know that they were from Mexico.

The COURT. Well, as I understand it, these individuals were transported by him in interstate commerce

as charged in the Indictment, but he claims that he didn't know that they were Mexicans.

The DEFENDANT. That's what he said.

The COURT. That is a plea of guilty. It may be entered, and the matter will be referred to Mr. Meili for a report.

I didn't mean to impose a burden on you that is too much, Mr. Meili, but you will have to handle that your own way.

Mr. ESSLING. If the Court please, we have the next matter of the United States versus Earl David Wilson. That was a matter on the general term calendar, being number 8308. Mr. Wilson, step up here, please.

If the Court please, this defendant is here by reason of an Indictment of the grand jury. He was at first arraigned before a commissioner in Duluth and he says that he did not know that he was to report here on the 23rd. I contacted his bonding company and they arranged to have him here today, and at this time we would like to move the arraignment of the defendant.

The COURT. Have you a lawyer?

The DEFENDANT. No, I don't.

The COURT. Well, don't you want a lawyer?

The DEFENDANT. I can't afford a lawyer, sir.

The COURT. What do you do?

The DEFENDANT. I administer the gospel.

The COURT. I know, but how do you earn your living, how do you eat?

The DEFENDANT. I work part time for a lumber company.

The COURT. How many hours a week do you work for them?

The DEFENDANT. About 32.

The COURT. Thirty-two?

The DEFENDANT. Yes.

The COURT. How much money do you get?

The DEFENDANT. About $40 a week.

The COURT. Are you married?

The DEFENDANT. Yes; I am, sir.

The COURT. Any children?

The DEFENDANT. No.

The COURT. You can't hire a lawyer on $160.00 a month?

The DEFENDANT. No, sir.

Mr. ESSLING. I might advise the Court, this defendant has told me that he is the owner of a 1949 Hudson automobile, against which there is a mortgage of about $400. He thinks that there is an equity of about $200 in that automobile.

The COURT. How much do you pay on the car every month?

The DEFENDANT. $50 a month.

The COURT. Well, where is our list—I saw Lee Williams here in the courtroom a little while ago. I'll appoint him to defend you.

You have to sit down until we get hold of him.

Mr. ESSLING. If the Court please, we have another matter from the general calendar, that being the United States versus Vance T. Weaver and Alphonse G. Porier. They are two cases, and they appear on the calendar as numbers 8255 and 8259. The defendants are here with their attorneys and it is my understanding they desire to change their plea from not guilty previously made, and enter a plea of guilty.

The COURT. What number is this?

CLERK OF COURT. Number 8255, it is on page six.

The COURT. All right.

Mr. Lyons and Mr. Hessian.

Mr. LYONS. Your Honor, I represent the defendant Porier. It is the desire of my client at this time to

change his plea to count number four of the Indictment to guilty from not guilty.

The COURT. Number four?

Mr. LYONS. That's right, number four.

Mr. HESSIAN. Likewise, if your Honor please, that is the desire on the part of Weaver to enter a like plea to count number four.

The COURT. Are those agreeable to the United States attorney?

Mr. ESSLING. Yes, your Honor. It is our position that at the time of disposition of the case as to count four the United States attorney will then ask leave of the Court to dismiss the remaining counts of number 8255 and also to dismiss the Indictment in case number 8259.

The COURT. That will be done when the matter is disposed of.

Mr. LYONS. Yes, your Honor.

The COURT. On the plea of guilty on count number four. The matter will be referred to Mr. Meili for a probation report and you gentlemen of course will be advised.

Mr. LYONS. Thank you.

Mr. ESSLING. If the Court please, I have one more matter that was set for this morning and that is the United States versus Russel R. Heim. That was returnable here this morning for any motions that the defendant's attorneys would like to make. I can advise the Court that yesterday I was advised by Mr. Stetson, an attorney associated with Mr. Jacobson, that the defendant does not desire to make any motion under Rule 12 attacking the Indictment. I asked them to write me a letter to that effect and I am advised by our office from St. Paul this morning that we have a letter from the defendant's attorneys to that effect

that they have no motions they desire to make in this case.

The COURT. Very well, it will stand as originally set for trial on the 20th of October.

Mr. HACHEY. One more matter, your Honor. If the Court please, number 8300 on the general calendar down about the fourth from the last page on my calendar, Arthur R. Lafanse.

The COURT. All right.

Mr. HACHEY. A previous plea of not guilty has been entered. It is my understanding talking with Mr. Petzke, counsel for the defendant, he wishes to change the plea to a plea of guilty and is here for that purpose this morning.

Mr. PETZKE. That is correct, your Honor.

The COURT. Is that your desire?

The DEFENDANT. Yes.

The COURT. Very well. The plea of not guilty has been withdrawn and a plea of guilty has gone in and it may be accepted. That will be referred to Mr. Meili.

And your name, please, I didn't get it.

(Mr. Petzke handed a card to the Court.)

Mr. HACHEY. I have one more matter—be the third page in my calendar, the matter of Noble H. Sheldon—I think it is the same page on your calendar, your Honor. The man is charged with taking a bribe or a refund of $15 from the substitute mail carrier in Hutchinson, Minnesota. After complete investigation of the matter it has been determined there is some question as to whether or not an amount of money was owed to the carrier, the defendant involved, by the substitute mail carrier. It further appears this defendant had put 40 years of service into the government. As a result of this unfortunate matter he has been dismissed from the service, and

it is our disposition that the matter should be dismissed, and we would so move this morning.

The COURT. It will be dismissed.

Mr. HACHEY. I prepared an order for your Honor.

The COURT. Very well.

Mr. HACHEY. Mr. Williams is here. I don't think he has any objection.

Mr. ESSLING. That's all we have on the criminal calendar, your Honor. Mr. E. H. Carson whom I previously mentioned in connection with the defendant Edward McCormick is here and I believe he would like to present a petition to the Court for an order to return money. If the Court would like to hear that now Mr. Carson is here.

The COURT. All right. Mr. Carson, I understand you have a petition.

Mr. CARSON. Mr. Essling will have to sign on behalf of the government and then it will be paid by Standard Act Insurance Company, an insurance company which paid the Citizens Bank at Waterville its full loss.

The COURT. Pardon me.

Mr. Williams, I have appointed you to defend the young man sitting in the seat with the lady in the back. His name is Wilson. You go ahead and talk to him. I will accept your plea later.

Mr. CARSON. Standard Act Insurance Company, by reason of the blanket bond, paid the bank its full loss, $5,217.85. That was the amount McCormick took from the bank by robbery to which he has pleaded guilty. Now, the FBI has in its possession $3,096 of cash that was a part of the loot from the bank, and McCormick had $1,195 of the loot to buy a second hand Buick, the 1948 convertible car from Stevens Buick. The car is in possession of the Police Department of the City of Minneapolis and the Police Department had been

holding the car at the request of the FBI for use as evidence, and similarly the FBI itself was holding $3,096 of currency as evidence in the trial of McCormick. Now he has pleaded guilty so there is no longer any need for either the FBI or the Police Department to have either the money or the car; the money with which the car was purchased was money taken from the bank.

Now, I have a petition for the return of those items made by myself as attorney for Standard Act, verified by me as true, and the petition asking for the return of that property to Standard is also joined in and approved by the defendant McCormick, by the Citizens State Bank of Waterville, by the City of Minneapolis, by the City Attorney and by Mr. Essling in behalf of the United States. Those are all parties in interest.

The COURT. There isn't anybody else you can think of can sign that?

Mr. CARSON. No, there isn't. An order follows the petition.

The COURT. Anything else, Mr. Hachey?

Mr. HACHEY. Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary period after his release from Stillwater, or any type of sentencing?

The COURT. It is to commence at the expiration of sentencing at Stillwater.

Mr. HACHEY. Probation to commence after expiration of his sentencing at Stillwater—for how long?

The COURT. Three years.

Mr. ESSLING. That concludes the matters we have, your Honor, except the man you referred to.

The COURT. Where is your client?

Mr. WILLIAMS. Has he been arraigned yet?

The COURT. No.

Mr. ESSLING. Government now moves his arraignment.

Mr. WILLIAMS. We will waive the reading of the Information, your Honor, and enter a plea of not guilty.

The COURT. Very well. This will be set for trial on a date designated by you or your office, whoever is handling it.

Mr. ESSLING. Very well.

The COURT. What are we going to have on Monday?

Mr. ESSLING. Case number 4, United States versus Leonard Nims, number 8252.

The COURT. Anything else?

Mr. ESSLING. That's all, your Honor.

(Whereupon, at 10:30 a. m., court was adjourned.)

I hereby certify this to be a true and correct transcript of all proceedings had in all matters taking place before the Honorable Matthew M. Joyce, United States District Judge for the District of Minnesota, from the opening of the Court on October 3, 1952, which took place at ten o'clock a. m. through ten-thirty o'clock a. m., at which time the Court retired from the Bench, and includes all the proceedings in the case of United States of America versus Thomas E. Pollard at that convening of the Court on that date, and includes all proceedings before the Honorable Matthew M. Joyce in open court on October 3, 1952.

Edith Krueger,
EDITH KRUEGER,
Reporter,

U. S. GOVERNMENT PRINTING OFFICE: 1956